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90-1512

Supreme Court, U.S.
FILED
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No._____

In the SUPREME COURT OF THE UNITED STATES

February Term, 1991

Robert E. Penn, and
Patsy S. Penn
Petitioner

v

The Parke State Bank
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Patsy S. Penn
Pro se Petitioner
159 N. 4th Street
Clinton, Indiana 47842
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QUESTIONS PRESENTED FOR REVIEW

1) Did the U.S. District Court act in collusion and determine to be legal, fraudulent behavior between Bank, Attorneys, & Federal Judge in the Indianapolis Division of the United States Bankruptcy Court?

2) Did the Parke State Bank, Attorneys and Judges in the Indianapolis Division of the U.S. Bankruptcy Court and U.S. District Court act in collusion and conspire in a scheme to defraud the debtor/appellant?

3) Did the Parke Circuit Court act as a companion in the plot to defraud the debtor/appellant?

4) Does this case expose evidence of Conspiracy in a Scheme in Restraint of Trade wantonly practiced between Bank, Attorneys, and Judges throughout the highest Courts of the State of Indiana and are our interlocking court systems (State and Federal) being used as a direct tool for defraudment? (i.e. purposely designed entanglement of evidence?)

5) Were the Penns **denied** the RIGHTS afford-them under the Fourteenth Amendment of the United States Constitution?

6) Did the Seventh Circuit United States Court of Appeals in it's review of case #89-3396, know crime had been committed, yet concealed it's knowledge to protect and assist it's peers?

7) Upon evidence of fraudulent behavior, should civil officers be removed from public office?

8) Should the United States Supreme Court mandate Congress for the determination of a department "with jurisdiction" to act upon the grievances of the people of this United States against representives holding civil office within and without our state and federal government?

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PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Robert E. Penn and Patsy S. Penn, the petitioners herein, respectfully prays that a writ of certiorari issue to review the August 7, 1990 Unpublished Order of the Seventh Circuit United States Court of Appeals case #89-3396.

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE

The August 7, 1990 order of the United State Court of Appeals for the Seventh Circuit case # 89-3396, whose decision is here-

in sought to be reviewed is appended as pages A-1 to 10. The September 29, 1989 final judgement of U.S. District Court Judge Sarah E. Barker regarding Case #IP88-299C is appended as pages A-13 to 32. The March 4, 1988, final order of U.S. Bankruptcy Judge Frank J. Otte regarding Adversary Proceeding Case # 87-0481 is appended as page A-33. U.S. Bankruptcy Judge Otte's findings of Adversary Proceeding #87-0481 (excerpt pages transcript of trial) are appended as pages A-34 to 55. The companion case #85-C-13 Parke Circuit Court order dated February 17, 1989 is appended as pages A-56 to 63. The companion case #85-C-13 Parke Circuit Court (excerpt pages) transcript of evidence is appended as pages A-64 to 74. The companion case # 61A01-8903-CV00081 final order of the Indiana Court of Appeals dated June 18, 1990 is appended as pages A-75 to 80. The Indiana Supreme Court's October 18, 1990 order denying to review Indiana Appellate case # 61A01-8903-CV00081 is appended as page A-81. The September 24, 1990 Seventh Circuit United

States Court of Appeals order denying Appellant's Petition for Rehearing is appended as page A-11. The October 15, 1990 Seventh Circuit United States Court of Appeals order Appellant's Petition to Recall and Stay it's 10/2/90 Mandate is appended as page A-12.

JURISDICTIONAL STATEMENT

The judgement of the United States Court of Appeals for the Seventh Circuit was entered on August 7, 1990. A timely petition for rehearing or rehearing in banc was denied September 24, 1990. By order dated December 18, 1990, the United States Supreme Court granted the petitioner an extension of time to and including February 21, 1990 for timely filing of Writ of Certiorari.

This Court's jurisdiction is invoked under 28 U.S.C. s1254(1) and Article III, Section 2, clause 2 of the United States Constitution.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND REGULATIONS INVOLVED IN THE CASE

While the pertinent verbal texts of constitutional, statutory, and regulatory provisions involved are set forth in Appendix pages A-120-133, due to their lengthiness, the following are the citations of the constitutional, statutory, and regulatory provisions involved in the case:

1. United States Constitution, Article III, Section 2, clause 2.
2. United States Constitution, Amendment XIV, Section 1.
3. Civil Rights Redress Act, 42 U.S.C. s 1983.
4. United States Constitution, Article III, Section 3.(1).
4. Title 11 U.S.C. s 105: Power of the Court.
6. In re Penn. Cent. Transp. Co., Pa. 1972 346 F. Supp. 1330
7. Bankruptcy Rule s 1330 (a), (b).

8. Bankruptcy Rule 8005.

9. Bankruptcy Rule 8001(c).

10. Fed. R. App. P. "X". Cross-Appeals and Joint Appeals.

11. Title 18 U.S.C. s 152 Penalty for Presenting Fraudulent Claim.

12. U.C.C.C. 24-2-2-3 Offense (with accompanying Historical Note).

13. U.C.C.C. 24-1-1-1 Contracts Against Public Policy.

14. U.C.C.C. 24-1-1-2 Violation of Act, Domestic Corporations, Forfeiture of Charter and Franchise: Foreign Corporations, Prohibition.

15. U.C.C.C. 24-4.5-2-414 Limitation on Default Charges

16. U.C.C.C. 24-4.5-2-204 Deferral Charges

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18. U.C.C.C. 26-1-1-205 Course of Dealing and Usage of Trade

19. U.C.C.C. 26-1-1-203 Obligation of Good Faith

20. U.C.C.C. 24-4.5-1-101 Uniform Consumer Credit Code

21. 2d Mortgages, Section 386: Indiana Rule of Law for Mortgage Acceleration Clauses.

22. U.C.C.C. 24-4.5-2-415 Authorization to Confess Judgement Prohibited.
U.C.C.C. 24-4.5-3-407 Authorization to Confess Judgement Prohibited

23. U.C.C.C. 26-1-1-107 Waiver or Renounciation of Claim or Right After Breach

24. U.C.C.C. 26-2-4-1 Agreements to Pay Attorney Fees Prescribed

25. U.C.C.C. 24-1-2-1 Illegal Combinations, Exceptions, Offense, Defense

26. 12 CFR 226 Promulgated under 11 U.S.C. s 1601 Disclosure Requirements:
12 CFR 226.9(6); 12 CFR 226.8(b)(3)
12 CFR 226.8(d) (3).

27. U.C.C.C. (I.C.) 24-4.5-3-301 Disclosure

28. U.C.C.C. 34-1-53-7 When Foreclosure Unavailable

29. U.C.C.C. 26-2-3-14 Judgement and Execution with accom. Historical Note

30. U.C.C.C. 26-1-10-102 Specific Repealer

31. United States Constitution, Art. II s 4.

STATEMENT OF THE CASE

This is an appeal from Adversary Proceeding #87-0481 which emanated from the Penn's Chapter 11 Bankruptcy Case #IP87-7652RAJ. The Penn's believe the basis for federal jurisdiction in the Court of first instance would be Title 11, Section 105 of the U.S.C. This case involves the continuance of fraudulent behavior portrayed between Bank, attorneys, and judges after this adversary case commenced. Adequate construance of the Petitioner's position requires full knowledge of the happenings, therefore the Penns pray this Court for tolerance in reading the facts which brought this matter to the highest Court:

The Parke State Bank (Bank) is a state banking organization operating under the laws of the state of Indiana with it's principal place of business located in the County of Parke, Town of Rockville, Indiana.

Robert E. and Patsy S. Penn (the Penns) are Parke County bred residents who executed

their signatures on 3 individual (step) mortgages with the above stated Bank pledging their real estate located at Route 4, U.S. 36 West, Rockville, Indiana, as security. Said mortgages were designed to pay materialmen as needed for the completion of the Penns custom-designed, custom-built home. Labor was not included in said mortgages but was supplied by the owner, Contractor, Robert E. Penn. The Penns executed their signatures on the final mortgage contract December 29, 1976.

Although there were various times throughout the history of their mortgage where the Penns wondered how the Bank had concluded various allegations in regard to their mortgage account; the Penns dismissed their conflicting re-evaluation feeling all bank transactions under the careful eye of Bank examiners. As the economy worsened in the early 80's, repeated rumors of underhanded dealings involving this Bank against various tradesmen were alledged and rumored to have prevailed in the County Court, yet the

Penns were skeptible of rumors, for this Bank had always been very considerate of the Penns trade wherby they allowed the Penns to make lump-sum payments upon construction contract completions and made every effort to aid the Penns in any personal or business need.

Then, without warning, the Penns found themselves to be the prime target. December 1983, the Bank foreclosed on the Penns mortgage (Parke Circuit Case # 83-C-288). Said case was filed without prior notice as required by Indiana Law and breached the established course of dealing and usage of trade the Bank had allowed the Penns throughout the history of their mortgage.

Seeking an explanation to the Bank's actions, Mrs. Penn confronted the Bank and was aghast to find the Bank's actions against the Penns motivated by malice. In confrontation, the Bank refused to discuss the Penns mortgage account accusing Mrs. Penn of being "slick" and a party to the "swindle" of Atorney Jack Mankin, who, (the Bank went on

to inform Mrs. Penn) had filed bankruptcy on a loan granted to him (on behalf of the Penns) while he was employed as council on Mrs. Penn's personal injury suit. The Bank refused to accept any explanation offered by Mrs. Penn and further refused to accept the Penn's monies offered in excess of amounts needed to bring the Penn's mortgage account current; stating they "did not want her money, they wanted her account out of their bank".

Thereafter, Mrs Penn contacted the *successor attorney of her personal injury case requesting he intercept in this matter. Subsequently, *Attorney Steven Trueblood contacted the Bank assuring them Mrs. Penn was not in collusion with the actions of Attorney Mankin and corroborated the fact that Attorney Mankin had indeed been reimbursed the monies he had borrowed from the Bank out of the settlement of Mrs. Penn's personal injury suit two years past. Thereafter, the Bank accepted the Penn's monies and the 1983 foreclosure case was dismissed.

Although the Penns felt their relationship with the Bank would return to normal, they were wholly mistaken. Thereafter, through malicious misrepresentation, monopolistic practices and knowledge of bank policies, the Penn's were not only forced out of business but completely out of their home by November, 1984. The Penn's were residing in a shanty house in a neighboring county at the time of the Bank's repeated foreclosure action in January 1985. (Parke Circuit Case #85-C-13). Attorney Trueblood declined to aid the Penns in this furthering situation with the Bank stating (1) he was not prepared for this type litigation and secondly that he was close friends with one of Bank's highest officials.

In attempts to find legal aid, the Penns soon found their chances in fighting this Bank's actions relatively "nil". With the Bank's representations, the Penn's financial position and the slow construction industry in general, the Penn's complaints were largely looked upon in disbelief. What

attorneys did take their time to listen either voiced lack of knowledge of Bank law or predicted extensive fight and requested outlandish "guaranteed" hourly fees. Finially the Penn's were notified of an attorney who had heard of the Penn's situation and was intrigued with the case. Contact to Attorney Peter D. Miller left the Penns in great relief. Miller stated the Penn's financial position was not an important factor to him, explaining he was in a salaried position as legal council for an Indianapolis based financial Institution able to take cases on the side. Miller openly displayed excitement with this case, stating he could work on a percentage basis or whatever, that he always wanted to open his own practice someday, and would enjoy the challenge of making a name for himself with this case. (So entered Attorney Peter D. Miller).

Although the Penn's had forewarned Miller of the situation in which he was entering (Bank attorney Hanner also in position as Parke County Prosecutor; Penn's

knowledge of past business relationship between the Hanner Law Firm and Parke Circuit Judge Earl M. Dowd; the rumors of underhanded dealings prevailing in County Court; etc.) the Penn's attorney appeared only more intrigued.

However, following Miller's first appearance in County Court, the Penns received a call from Miller whereby he informed Penn's of his opinion of Penn's chances in County Court being "at best 50/50". The Penns asked of having matter venued to which Miller responded "foreclosure actions cannot be venued." Thereafter, Miller stated his purpose in calling was to seek the Penn's feelings in filing a Chapter 11 Bankruptcy Petition which would stay the state court action and grant access to dispute the claim on neutral ground. Reluctantly, the Penns agreed.

The Penn's Chapter 11 Bankruptcy Petition was filed November 1985 and referenced as case #85-2103THRA (Terre Haute Division). Thereafter Parke Circuit Court Case #85-C-13

was stayed pursuant Bankruptcy Act.

Early January 86, Miller telephoned Penns stating he had just returned from the Bankruptcy Court and found that the Bank had fiiled a petition for adequate protection or abandonment. Miller continued he had just been informed by the Court that the Penns would have to enter into a protection agreement with the Bank: resume their monthly payments as to their mortgage agreements ($588.10 per mo.); pay all past due taxes (approximately $4000.00); supply insurance to protect the bank's interest ($507.00); and re-establish their mortgaged premises as their primary residence: **before** the claim of the Bank could be disputed in bankruptcy procedure.

Although the Penn's felt this very unfair, they stated their agreements feeling this Court their only access to justice.

Subsequently, Miller informed Penns the Bank was sending it's appraisor to the Penn's mortgaged property at the cost of the Penns. The Penns objected informing Miller

they wanted an unbiased appraisal if at their cost. Miller advised a rebuttal appraisal could be prepared later if needed, but he did not feel Bank would care to continue in underhanded dealings in federal court. Miller was wrong, however, as exactly as rumored, the Bank's appraisal was in amounts equal to the Penn's property tax assessment. Rebuttal appraisal was then acquired from the firm of William Saeger, SRA, at a further cost to the Penns of over $700.00.

By early March 86, the Penns had complied to all stated requirements of the adequate protection agreement and had re-established their mortgaged premises as their primary residence.

On December 28, 1986, the Bank filed it's Proof of Claim to the Bankruptcy Court. (Appendix pages A.116-119).

March 16, 1987, the Penns were informed their disputes against the claim of the Bank was filed to the Court. (Said was referenced as Adversary Proceeding #87-0043 and titled "Objection to the Allowance of

Claim".

Close to two years passed from the date of the Penn's bankruptcy petition until date of adversary proceeding trial. The Penn's had ample time to view Honorable Judge Michael H. Kearns and found him at all times upholding the highest ethics of his profession. The Penn's felt assured justice would prevail in Judge Kearns Court. Although in the latter 3 months prior to trial date, the Penn's did notice and discussed the fact their attorney appeared to be getting awfully friendly with Bank attorney and representatives, the Penn's chalked this off as professional ethics for toward the Penns, Miller appeared intent on their disputes.

On trial date, Court was running far behind in schedule. Two of the Penn's witnesses (Attorney Trueblood and Clinton State Bank President Steve Chenhall) waited inside the Courtroom while two waited in the hall with the Penns. The Penn's attorney met briefly with the Penns, then (as was the situation in approximately the last 3 hear-

ings) scurried off to the far end of the hall, laughing and conversing with Bank attorney and representatives. Later, Miller and all Bank representatives went into the court library; time lapsed and Miller returned informing the Penn's the attorneys for the parties had just been called to the judges chambers. The happenings thereafter which forced the recusal of Honorable Judge Michael H. Kearns and the transfer of this case to the Indianapolis dividion is formally documented in "Order of Recusal" dated December 15, 1987 executed by Honorable Judge Kearns. Appendix p.82-88. (i.e. In front of witnesses attorneys returned and elaborately portrayed Judge Kearns as hostile in hearing the case and angry the parties had not settled their disputes. Bank made repeated negotiation offers (through Miller) each offer slightly lowering the amount of charges which had been added to Penn's mortgage account. Miller insistantly advised the Penn's to accept the Bank's offers. Mr. Penn gradually grew skeptible and left the

decision to Mrs. Penn who remained unconvinced and determined. Thereafter, staged demonstration of Judge Kearns' hostility was displayed. Miller then warned Mr. Penn of the repercussions which would undoubtedly occur should he allow this case to go before a hostile judge. Thereafter, Mr. Penn overruled Mrs. Penn's decision, telling Miller he did not feel he owed the Bank anything but stated the terms in which he would accept the Bank's offer. Attorneys thereafter conversed then left to inform the Court an agreement had been reached. In returning, Miller conversed with the Penns in apparent relief. The Penns had prior invited the Millers to dinner following Court and in preparing to leave, Miller unknowingly made a statement which signified the agreement entered to the Court was in direct conflict to the terms of Mr. Penn's agreement. When statement was challenged by both Mrs. Penn and Penn's witness accountant Alice Swaim, Miller blamed his statement on nervousness of the situation and assured the agreement entered

was as the exact terms of Mr. Penn. In leaving, Miller's newly acquired late model vehicle was apparent. Conversing through dinner, Miller showed Mr. Penn the floor plans of the new building he had "just acquired" to open his own office. The following morning, Mrs. Penn's suspicions were confirmed. The attorneys had misrepresented Mr. Penns terms of agreement to the Court. In angry confrntation with Miller, Mrs. Penn reminded him the manuever was incomplete for the Penns had not executed their signatures on the agreement. Miller laughly stated, "You can't do anything about it, Patsy. You're signatures are not required". This prompted Mrs. Penn to go to the Court where she found her further suspicions also correct: Honorable Judge Kearns was under heavy docket, was innocent party, and unaware of attorney maneuvers. Judge Kearns then had Mrs. Penn to put the happenings on the record (with Penn's attorney present) and although Penns felt no hostility toward the Court, Honorable Judge Kearns felt it best he recuse his position

and transfer the case to the Indianapolis

Mrs. Penn promptly terminated Miller, requesting he return the Penns materials. Weeks passed, materials not received, the Penns made repeated requests by telephone. Miller then stated he would not return the materials to the Penns but would forward them to the Penns attorney, once he was assured proper legal council was in place. Time lapsed with the Penns in extensive search. Mrs. Penn was under extreme duress conditions with the Court/attorney situation, her mother terminally ill, and her sister suddenly striken paralized and fould to have multiple myeloma. Unable to afford attorney fees repeatedly requested, Mrs. Penn exhausted her search for council early January 1988, informing Miller of her intentions to act pro se and demanding the return of materials. Miller again denied materials stating he had "filed the complaint and made legal obligations to the Court tnat legal council would be provided";further stating (verbatum) "if

you cannot afford another attorney, I certainly cannot, and I will be the one representing the case".

The Penn's bankruptcy case transferred to the Indianapolis Division was referenced as case# IP87-7652RAJ. The adversary proceeding case transferred was referenced as #87-0481. The Penns received no notification from the Indianapolis Division of the trial date set for the adversary proceeding and was notified by Miller the Monday night prior by phone. Penn's informed Miller they wanted all facts and evidences of the Bank's actions submitted to the Court. Miller stated He was the attorney and would make the decisions of submittals and would prove malice. In answer to Mrs. Penn's request, Miller stated he saw no need for getting together prior to the hearing and advised, "answer only my questions, and I'll guide you to where we want to go."

Adversary Proceeding trial March 4, 1988, there was an ice storm which caused popping and cracking and the lights to flick-

er off and on in the courtroom. The Bank's attorney Hanner, who had single-handedly represented Bank in the Terre Haute division had acquired co-council (Indpls. based attorney Michael Hile) to aid him in the Indianapolis division. As Court came to order Judge Otte's familiarity with Bank's co-council was recognized by all. (Throughout trial co-council's appearance was justified only by directing questions to Bank Attorney Hanner on matter of rate of attorney fees in the county of Parke.) The Penn's attorney spoke very low where (with the popping and cracking of ice storm) at various times made him hard to hear. Although Miller did bring forth enough facts of law which could be construed as reason for filing complaint; he suppressed substantial issues, information, and evidences of the extensive malice and damages endured by the Penns; suppressed thousands of dollars which were misallocated by Bank in Penn's mortgage history; directed questions to Penn's witness to support facts she was unaware of; and directed questions

to Penn's which did not allow for answers to show elements of merit which could lead to further facts. Throughout Mrs. Penn's testimony Bankruptcy Judge Otte impatiently kicked his desk, repeatedly rolling his eyes at Court assistant who apparently found Judge Otte amusing for he was opening laughing. As Miller appeared to be closing Penn's case, Mrs. Penn made attempt through Miller to re-enter the stand. This attempt was directly denied by Judge Otte; therefore the Penn's had no access to clarify the situation.

As oral argumentation concluded, the Penn's were confused by Miller's presentation: Miller brought forth the fact of Banks' actions (December '83) being initiated without probable cause and without notification as required by Indiana Law; he evidenced the Bank had violated it's covenants by Charter of Good Faith and Fair Dealing while also evidencing Bank had breached the established Course of Dealing and Usage of Trade Bank had allowed the Penn's throughout the history of their mortgage. He directly caught Bank rep-

resentative Roger Allen in purjury statements which along with the written evidence from Attorney Stephen Trueblood substantiated the fact the Bank's actions against the Penns were motivated by malice. He evidenced the violations in regard to the disclosure statements and brought forth a minor error in Bank's allocations of the Penn's mortgage account. Why would he suppress the extensive malice and damages endured by the Penns from this Bank's continuing actions? Why would he bring forth only minor monitary error when major errors existed? Why did he suppress the thousands of dollars in illegal costs added to Bank's claim referenced as interest charges, late fees, and attorney fees? Why did he fail to challenge Bank's claim in regard to insurance and taxes?

In the Bankruptcy Court's judgement received, the Penn's objections to the Bank's claim was sustained in part and over-ruled in part. The Penns were awarded statutory damages from the Bank's stipulations to "minor technical violations." All other

facts of law was deemed irrevelant in the judgement received while the Bank's actions toward the Penn's were upheld in judgement by the provisions of the Bank's note and mortgage contract (contract against public policy.): Judgement concluded:

> "But first I want to say that as that as to Counts I and II on the matter of the truth in lending allegations, I'm going to deal with those last. Taking Count III as set out here, the issue being, Did the Defendant's actions in re-allocating a previously settled payment violate the implied covenants of Good Faith and Fair dealing? The Court finds no evidence of that presented by either party and that therefore I must rule for the Defendant...Now as to Count Three, Are punative damages affordable to Plaintiff because of the Defendant's actions in reallocating the previously settled payment? ...And I find there is absolutely insufficient evidence to award any punative damages on that Count, and so find for the Defendant, the Parke State Bank. Now as to Count Four, was the Defendant's initiation of a foreclosure action or proceeding on December the 20th of 1983 without probable cause? The history of the payment of this loan from the beginning in 1976 is a history of very erratic payments. In reviewing the documentary evidence submitted, I find that the late charge of $11.00 and some odd cents were paid almost as often as the--as the interest pay-

ment and the principal payment. And I believe the Bank had every cause it needed to file that foreclosure action in December of '83 on a loan that was admittedly, by all parties, deliquent at the time. On Count Four, did the Defendant's initiation of foreclosure proceedings breach a previously established course of dealing with the Plaintiffs without prior notice? Now it is true that for--the Bank did accept late payments, but there is a point in time where enough is enough. And the loan was behind at the time the foreclosure action was filed. The documents call for acceleration. Foreclosure is the proper procedure to accelerate and to foreclose on the mortgage...As to Count Four, did the Defendnat's initiation of foreclosure proceedings breach a previous verbal agreement? And the Court finds that it did not...We do have some conversation about what may have been said by whom, when. Its a controversy, but my findings is based on the evidence presented to me, and having had the opportunity to observe the witnesses and their--all that goes with that, that was not a violation, and I find for the Defendant, Parke Bank. Now was the Defendant's initiation of a foreclosure proceeding motivated by malice towrd the Plaintiff? And I find no evidence of that. In fact, I find it interesting that this Mankin problem, the second note having to do with the personal injury, was really something that came up as an accomodation...and we may have some evidence of frustration. We may have some evidence of just even anger..but our world

is not too pristine and pure that people can't get upset over things that just don't go right, where we have to translate that into malice and punative damages. I find the evidence is clear there was no malice and I therefore find for the Defendant, Parke Bank. And did the Defendant's initiation of foreclosure proceedings breach the implied covenant of good faith and fair dealing? And I dealt with that on amendment. The answer is no, it did not, and I find for the Defendant the Parke State Bank on that Count and issue.And did the Defendant's initiation of foreclosure proceedings cause injuries to the Plaintiffs'personal and business dealings? Now we have in the record here income tax returns, schedule C's and testimony from Ms. Swaim...there just wasn't anything that this Bank did that agravated,caused, or in any way, in my judgement, affected their business dealings or caused any injury to them. Now, let me say that the amount of the claim here that is going to be allowed with certain deductions to be as follows. The claim was filed back in December of 1986 in the amount of $67,345.93. And we've already had some discussion here on the record concerning the interest on some $9,900.00,and the Court will not add any interest to that. However we did have testimony as to attorney fees, that being 52 hours and the Court knowing what time we started and what time it is now, is going to add four hours to that, at $60.00 an hour is $3,360.00. And I think in fairness to everybody I've got to consider the fact that Mr. Hile

was here, and I'm going to make the attorney fees $3500.00 for a total amount of $70,845.93. The thing I had to wrestle with in this case is the truth in lending section in Counts One and Two...As to the allegations that the Bank violated the truth in lending and the Uniform Commercial Code as enacted in Indiana, the Bank has stipulated that such violations occurred and so characterize those violations as technical violations. ...and the Bank cannot escape liability for them. Now the Penns have completely and totally failed to show any damages to them because of the improper disclosures. I find it absolutely amazing that somebody can come in ten years later and say, all bets are off, I didn't have my three days notice to recind. ...be that as it may, often times the Court finds things in the law that must be followed somewhat surprisingly, and this is one of them. However, I think that the Penn's, because there was a violation, are entitled at most to $1000.00 damages pursuant to 15 U.S.C. section 1550, sub-paragraph A(2)(a), plus costs and reasonable attorney fees pursuant to section 1640A(3). And in addition to an award under the truth in lending act, the Penns may also recover for violation under the UCCC. Violation of the truth in lending is a violation of the UCCC...And Indiana Code 24-45-5-203 provides the same damages that would be available under the truth in lending, known as TILA. There is no more than $1000 for this particular transaction because again, I think the Penns have failed to establish any other

damages...And therefore, although Court finds the improper disclosures to be quite minor and the fact that such violations can be subject to a federal lawsuit positively ludicrous, the Court is required by law to award the Penns a set-off $2000.00 against the claim of the Bank. The Penns are also entitled to a set-off of reasonable attorney fees....and the Court believes a fair and equitable award for the time expended by Mr. Miller..given the fact that the Bank has stipulated the violations is $500.00. Now the Penns are also entitled to costs of this action, and they've presented no evidence as to these costs...And the Court recognizes that a normal procedure in this case having been filed that the Penns would have paid $120.00 to file the adversary proceeding. However, in as much as the truth in lending is only a small part of this adversary proceeding in the absence of the other evidence of costs, the Court declines to award costs to the Penns. So, in conclusion, the Penns may off-set the claim of the Bank by $2,500.00.....I might point out that in reviewing this and not only the pleadings but hearing the witnesses and observing their demeanor, all of which this Court has based it's judgement on, that we have a relationship of a Bank and folks start back some twelve years ago, I find the Bank was tolerant, understanding, and probably as I characterized earlier a small town Bank trying to help people they knew, and we get these pleadings with these punative damages in them. And this is a case that I just don't

> think they're necessaray at all. We have a mind-set in this country of legal lottery. This Court's not going to play that. If you want to hit the lottery, you buy your ticket in Illinois. But we know full well on contract actions that it takes an awful lot in this State to prove up punative damages. Nothing in this case even came close to that. And I would say that as lawyers, gentlemen, you have a duty to be councellors first, peacemakers in these matters, not to bring client's hopes up in hitting the jackpot. Anyway, that's my ruling."

See Bankruptcy Court Findings, Transcript of Trial Appendix pages A-34-A-55. Regardless of the fact Judge Otte himself had commented on the fact the Penns were current on their adequate protection payments on trial date (appendix page A-35) the approximate $14,000. paid by the Penns "to protect the Bank's interest" while awaiting trial had never been applied to the amount of the Bank's claim dispite the Bank's statements to the contrary (A-35) of which the Penn's attorney failed to rebute. Although this fact should have been evident to the Court, it was a further factor deemed irrevelant in the judgement received from the Bankruptcy Court.

In leaving the Bankruptcy Court March 4, 1988, the Millers scurried at the Penn's attempt to confer. Thereafter, the conditions to pursue this matter was set forth by Mr. Penn: 1) There would be no further monies paid to the Bank if further monies paid to bank was a requirement for access to justice. 2) The Bank would have no further accesses, there would be no more attorneys. The Appeal would be presented pro se.

On March 8, 1988, Miller agreed in a telephone conversation with Penn's the case **he filed** was over and agreed to remove his appearance from the Penn's Bankruptcy case and return Penns materials.

March 14, 1988, the Penns filed pro se to the Bankruptcy Court Motion of Appeal/ Request for Transfer. Said motion requested appeal from the Bankruptcy Court's final judgement of Adversary Proceeding #87-0481 March 4, 1988 whereby the Penns addressed their complaints of fraudulent behavior between the Bank's attorney, Penn's attorney and Bankruptcy Judge Otte. Penns requested

Transfer of their main bankruptcy case from the Indianapolis Division.

The Penns Motion of Appeal was docketed into the Indianapolis Division of the U.S. District Court on March 15, 1988 as case # IP88-299C and assigned to U.S. District Court Judge Sarah E. Barker. The Penn's request for Transfer of the main bankruptcy case was DENIED by the same Bankruptcy Judge Frank J. Otte March 15, 1988.

Approximately 2 weeks later, the Penns heard (via international news broadcast) the FBI was investigating 22 complaints of conspiracy and fraudulent behavior between attorneys and Judges in the Indianapolis Division of the U.S. Bankruptcy Court. The Penns informed them of the 23rd party in similiar complaint, only to find the FBI did not have jurisdiction to aid in this matter and could not interfere with a citizen's right to appeal. The Penns were directed to taking their complaints to the U.S. Trustee whereby the Penn's then found their Bankruptcy Case filed prior to those now desig-

under the jurisdiction of the U.S. Trustee.

Aside from copies of financial statements (which Penns prepared) the Penn's had never been in receipt of copy of any document filed in their bankruptcy and adversary proceeding cases. Latter March, '88, the Penn's received partial return of materials (bankruptcy plan documents) along with a cover-letter from Miller informing Penns of a scheduled hearing on the confirmation of plan set in Bankruptcy Court for April 15, 1988. The Penn's promptly filed Motion of Stay of the March 4, 1988 order of Adversary Proceeding #87-0481 to the U.S. Bankruptcy Court. Subsequently, the Penns received notice the Bankruptcy Court had scheduled hearing for the Penns Motion of Stay at same date and time scheduled for confirmation of plan hearing.

Having not received materials necessary to adequately pursue appeal prompted Mrs. Penn to telephone Miller who stated he had not yet had time to copy materials for his files; that he was just leaving on vacation

and would forward Penns materials upon his return. Penns arguments were in vain. This entire situation prompted Mrs. Penn to form letter to the Chief Administrative Judge of the U.S. Bankruptcy Court. Since the Penns Bankruptcy petition had been filed in Evansville, In., Mrs. Penn forwarded said letter to that address. Letter was in request for aid to both the return of the Penn's materials as well as transfer from Judge Otte's courtroom. Subsequently, the Penns received copy of cover-letter which indicated the Penns letter to Chief Administrative Judge had been intercepted in Evansville by Honorable Judge Michael H. Kearns and forwarded to Chief Judge Bayt in the Indianapolis Division with cc to Judge Otte. (See said cover-letter as A-90.) This letter has never been acknowledged.

In reviewal of the plan materials received from Miller, Mrs. Penn found the majority of the Penns executed agreements in their bankruptcy case had been objected to by Bank, had been vacated, and amended by

Miller without the Penn's knowledge. While one document evidenced the Penn's signatures forged; others were executed by attorney Miller. Penns immediately sent emergency letter to Bankruptcy Judge Otte stating their findings, requesting his reviewal of documents, with further request for withdrawal of fraudulent documents and the Court's allowance to amend said documents as to the agreements of the Penns. Thereafter, hearing on confirmation of plan was continued, while hearing on the Penn's motion of stay remained scheduled. The Penns were advised by Court to make a formal motion to withdraw pleadings by 4-12-88, and Penn's complied.

Entering Judge Otte's courtroom April 15, 1988, Bank was not present although co-council was. Judge Otte appologised to the Penns stating he had been unable to reach Penns by phone to prevent the (2 hour) trip to Indianapolis; explaining co-council was there on another matter and the hearing on the Penns Motion of Stay had been cancelled. He thereafter stated perhaps he should put

his findings on record since Bank's co-council was present and the Penns were obviously not informed. Whereby, Judge Otte called the Court to Order, recognized the presence of the Penns and Bank co-council and stated "The Penns Motion of Stay had been DENIED for reason there was no appeal pending." Hearing concluded.

At Mrs. Penns obvious astonishment, Otte went into his chambers returning with a copy of District Court Order dated April 13, 1988, handing it to Mrs. Penn for verification. The District Court order concluded Penn's appeal premature lacking appealable order.

Returning home, Mrs. Penn immediately forwarded Motion of Reconsideration to District Court attaching copy of Judge Otte's final judgement order of Adversary Proceeding #87-0481 dated March 4, 1988. Said motion expressed Penn's construance the Bankruptcy Court had transmitted said final order with Penn's motion of Appeal. Subsequently, the Penn's appeal was reinstated by the District Court Order dated April 22, 1988.

Thereafter, Penns received letter from Bank attorney Hanner notifying Penns of Banks' intentions to pursue remedies in the State Court, informing Penns of a provision in the adequate protection agreement which allowed Bank a lifting of stay. Penns were angry for their agreements confered with Miller did not allow the Bank access out of the federal court system. The Penns felt it was the Bank not the Penns who had breached the protection agreement, but since the Penns had never seen the formal agreement entered to Court by attorneys, they were unaware of it's contents.

Thereafter, the Penns received copy of Transcript of Adversary Proceeding Trial which clarified the reasoning behind Miller's barely audible voice, for in transcript Miller had intentially misrepresented Penns position to the Court stating the Penn's not in dispute of the amount of Bank's claim.

May 3, 1988, Bankruptcy Judge Otte Ordered Plan of Agreement documents WITH-DRAWN allowing debtor time within which to

amend. (See A-92).

The Penns had filed their arguments in appellants brief to the district court whereby bank had requested extension of time to reply. June 2, 1988, Penn's filed Emergency Motion of Stay to U.S. District Court, said document and enclosures clearly referenced stay of Bankruptcy Court's Judgement of Adversary Proceeding #87-0481 while informing the District Court of bank's intentions of pursuing remedies in State Court. June 6, 1988, the bank re-entered the stayed State Court foreclosure case filing Motion for Summary Judgement (A-99) whereby said motion was set for State Court hearing June 27, 1988.

On June 7, 1988, U.S. District Court Judge Sarah Evans Barker DENIED Penn's motion of stay. Said order clearly displayed prejudice and encouraged Bank to proceed with it's foreclosure action stating the Penns had not made the irregularity or illegality of documents an issue in Appeal. (See A-94 to A-98).

Mrs. Penn was frantically attempting triplicate Court situations while frantically running to hospitals in opposite directions to be with her mother and sister. As her sister rallied and went into remission, her mother worsened and went into intensive care. Mrs.Penn was just completing State Court Motion to Dismiss contending lack of jurisdiction when summoned to the hospital 27 miles away. Her mother died in her arms 15 minutes after her arrival. The guilt for spending so much time away from her on this materialistic matter was overwhelming.

Thereafter, this case proceeded through triplicate court situations in the following manner: (District Court) Bank again requested extension of time in which to reply and the Court obliged. On 6-21-88 the Penn's filed Motion to Add Further Issues in Record of Issues on Appeal while (same date) filing Motion of Stay of State Court Proceeding; this motion informed Court of the prejudice situation in the County of Parke being Penn's direct reasoning for filing disputes in fed-

eral procedure. On June 24, 1988, Judge Barker DENIED Penn's Motion of Stay of State Court Proceedings Pending Appeal with statement: "most issue raised here was resolved by Court's prior entry June 7, 1988...There is no legal basis for relief sought in this Court." (A-100). Bank then filed it's Brief to which Penn's filed Reply.

(State Court) The Penn's made every effort to stop this Bank filing Motion to Dismiss, Motion of Stay Pending Appeal, Motin of Continuance Pending Appeal, Motion of Reconsideration of Motion to Dismiss and/or Motion of Stay Pending Appeal in Regard to Facts and Findings of Law. In State Court reply what Penn's motions were not immediately over-ruled were set to be heard in the rescheduled Summary Judgement hearing July 20, 1988. In said hearing the Penns disputes pending appeal, jurisdiction, and prohibiting statutes of law were brought forth. Bank then entered the June 7, 1988 District Court Denial of Stay as evidence and used said document as a tool to entice Judge Dowd from

the law.Penns then read the provisions of IC 34-1-53-7 (WHEN FORECLOSURE UNAVAILABLE) to State Court. Judge Dowd asked Bank, "You ever heard of this law, Jim? Hanner replied, "I never heard of it, your Honor," and moved the Court to reply to Penn's previous motions filed. State Court then OVER-RULED all Penns motions. Bank moved the Court for hearing on the merits withdrawing it's motion for summary judgement and it was so Order with a hearing set for August 11, 1988.

August 2, 1988 the Penns filed Emergency Motion to Stay State Court Trial to District Court. Said motion and enclosures informed the Court of the laws prohibiting this Banks actions while further informing the Court of the prejudice displayed in State Court which was endangering the concerns of the appellants. August 8, 1988, U.S. District Court Judge John Daniel Tinder DENIED this motion with statement: "this motion repeats claims which were denied in the June 24, 1988 ruling of a similiar motion". (A-101)

In attempt to find any lawful basis for

the District Court's actions, the Penns sought legal advice. In finding there may be a possibility the Bankruptcy Court's judgement,which withdrew the Bankruptcy Plan of Agreement documents did not include the adequate protection agreement; the Penns then filed to the Bankruptcy Court Motion to Vacate the Adequate Protection Plan of Agree-Ment and Request to Stop State Court Proceeding: said motion informed Court of the situation at hand and noted Section 105 of the U.S.C. in support of it's motion. Said was set for hearing in the Bankruptcy Court on August 18, 1988. Although the hearing concluded with Bankruptcy Judge Otte taking subject matter under advisement, on same date Judge Otte issued Order disregarding Penns evidence and facts of law DENYING Penn's Motion to Vacate Adequate Protection Agreement stating Bank "free to proceed with it's foreclosure action". (A-102 to A-104).

To State Court Mrs. Penn filed Counterclaim for Damages, Motion for Jury Trial and threatened to bring in the press if this mo-

tion too was denied. Subsequently, Penns received notice State Court Judge Dowd intepreted Penn's Motion as a request for a change of judge whereby he appointed a panel for alternate striking. Thereafter, Judge Charles K. McCrory remained unstriken and accepted position as "Court". Parties were later ordered to submit their contentions.

Throughout this time Mrs. Penn's sister was begging her to quit fighting this Bank and spend time with her. Mrs. Penn told her of her deep moralistic feelings in this matter and assured her she'd spend alot more time with her as soon as she could get this state court action stopped.

August 31, 1988 Penns filed to District Court "Emergency Final Request for Reconsideration of Stay Pending Appeal of State Court Proceeding. This motion requested Stay of the attached Bankruptcy Order Denying Penn's Motion to Vacate which would in effect stay the state court action. September 1, 1988, District Court Judge Barker again DENIED Penn's final motion for stay. Said denial

alledged: "this Court lacks jurisdiction to stay state court action". (A-105).

Mrs. Penn's sister suddenly took a turn for the worse and died on September 31, 1988. Mrs. Penn completely lost it.

In deep contempt the Penns filed their Defendant's Disputes and Issues to be Tried to State Court on October 17, 1988. On Oct. 28, 1988, Bank filed it's contentions to State Court making no attempt to disquise its intentions (see A-106to A110):

> (A-109)**"The Penns are still in the Chapter 11 reorganization bankruptcy and it is the contention of the plaintiff that the questions raised by the defendants are res judicata as to all matters of fraud, violations of the U.C.C.C., reallocations of previously settled payments, and all other matters propounded by the defendants. Further, the Defendant's have prayed this Court for trial by jury. Not only is such a request grossly untimely, it is not allowed by statute."**

Subsequently, the Penns received notice from the Bankruptcy Court that Bank had objected to the Penns amended disclosure statement October 31, 1988 and the Court had set a hearing on the Bank's objections for 11-2-88.

In regard to the fact the Penns had filed their amended disclosure to the Court in July 1988; the Bankruptcy Court had allowed the Bank a lifting of Bankruptcy Stay August 18, 1988, and the Bankruptcy Court was now scheduling a hearing on the objections of an irrevelant creditor was a situation Mrs. Penn did not want involved in alone. Regardless of jurisdiction, Mrs. Penn requested the presence of U.S. Trustee representative to sit in on hearing date.

Pretrial conference was held before Judge Charles McCrory in **STATE** Court on Oct. 27, 1988. Dispite the Penns disputes of the pending district court appeal, lack of jurisdiction and prohibiting statutes of law, Judge McCrory stated he had "con-current jurisdiction" and agreed with Bank's contentions Penn's disputes against Bank's claim were res-judicata and Penns request for jury trial was not allowed by statute. Judge McCrory informed Penns their only issues before this Court would be "Did you execute this mortgage? Did you receive these monies?..and

Have you paid these monies back? The Penns assertation of State Court's willful interference with Penns rights to equal access to justice and due process of law were taken under advisement.

Unaware of proper procedure the Penns formed letter to Chief Judge of 7th Circuit stating the situation at hand, requesting direct appeal from the District Court's denial of Stay September 1, 1988. This appeal was docketed into the 7th Circuit 11-21-88 as case #88-3291. The Penns paid appropriate docketing fees to the district court on 11-28-88. Subsequently the Penns received notice from the 7th Circuit the appeal had been untimely filed (42 days late) and could not be accepted without the district court granting an extension of appeal period. Penns immediately filed Motion of Extension of Appeal period to District Court on Dec. 1, 1988. Penn's expressed duress between the fraudulent triplicate court situations and death of a family member as reasons which prevented timely filing, while request-

their rights for equal access to justice and due process of law. December 16, 1988, District Court Judge Barker issued Order nullifying Penn's appeal to the 7th Circuit with statements of "no appealable order...no request for an extension of time has been submitted; nor no docketing fees for appeal have been paid." (A-111-114.)

The Bankruptcy Court's hearing on the Bank's Objections to the Penn's disclosure statement was quiet, quick and discrete. Otte asked U.S. Trustee Respresentative if he was there on the Penn's behalf to which representative replied: "I have no jurisdiction in this case, your Honor." Judge Otte asked Mrs. Penn if she would agree to address the Bank's objections in a further amended disclosure statement to which Penn agreed. Otte thereafter directed Mrs. Penn to confer with Bank before leaving to assure she understood Bank's objections; Hearing concluded. Mrs. Penn was grateful to address this Bank's objections formally for Mrs. Penn had not misconstrued the Bank's objection

nor the Bankruptcy Court's intentions in regard to the hearing. This fully secured creditor who had stipulated in Bankruptcy Court"the value of it's colleratal exceeded the amount of it's claim" was now through the aid of Judge Otte, seeking for the Penns "to disclose how they were going to pay their prosective deficiency claims should this mortgage be foreclosed." December 7, 1988, the Penns filed to U.S. Bankruptcy Court: "Motion of Dismissal and Amended Disclosure Statement Reply. Said document fully addressed the objections of the irrevelant creditor (Bank) while further addressing the highly irregular behavor of Judge Otte and the Penn's awareness of the intentions between said two parties. The Penns thereafter requested Dismissal of the issues remaining in their Bankruptcy Case pursuant to Bankruptcy Rule s1330 (Fraud).

January 5, 1989, the Penns filed "Memorandum & Emergency Motion for Reconsideration of Order dated 12-16-88 to District Court. Said memorandum informed the Court the Penns

were still awaiting District Court reply of their 12-14-88 motion of extension of appeal period while emergency motion of reconsideration of order dated 12-16-88 argued the validity of the facts by which the District Court Nullified Appeal 12-16-88. Penns requested reconsideration in regard to true facts. The District Court did not respond and thereafter 7th Circuit case # 88-3251 was dismissed for lack of subject matter jurisdiction.

Subsequently, the Penns received notice the Parke Circuit Court had scheduled trial for February 9, 1989. The Penn's promptly filed complaint to the Indiana Judicial Qualification Committee. Subsequently the Parke Circuit Court issued press statement **"Parke State Bank v Robert Penn, Jury Trial"**. The state court would make no comment regarding press statement nor was the Penns notified in the selection of a jury.

With no comment regarding the true facts behind said motion, on January 4, 1989, the Bankruptcy Court GRANTED the Penns "Volun-

tary Motion of Dismissal".

Late January 1989, the Penns received notice their complaints to the Indiana Judicial Qualifications Committee had been dismissed without merit.

Parke Circuit Court February 9, 1989, there was no jury "hand selected" by the Bank; there was no jury period. Bank argued it's same contentions extending the amount of it's illegal charges. As Mrs. Penn attempted to address the Bank's contentions (excerpt pages of transcript A-64-74) Bank objected and Court interrupted with "Well, Mrs. Penn, let me tell you at the out-set here, we are not going to try the Bankruptcy case;" Mrs Penn continued (on the record) the State Court's awareness the Penns could not obtain equal access to justice in this proceeding; to which State Court immediately interrupted changing its prior conclusions in attempt to make it appear Mrs. Penn had misconstrued its prior conclusions. (Mrs. Penn had prepared for trial following pre-trial instructions) therefore the hearing continued with heated

statements between Mrs. Penn and Court. In conclusion, the Penns assertations regarding the illegality of the continuance of the foreclosure proceedings and State Court's willful interferance with Penns Rights to Equal Access to Justice and Due Process of Law were taken under advisement.

In returning home from State Court, the Penns found Bank's "Motion to Dismiss" which had been filed to the District Court the day before. Said motion was formated in attempt to dismiss appeal for reason the Penns had "voluntarily dismissed their bankruptcy case. Bank asserted Penn's appeal as "moot".

The following day the Penns received District Court Entry (inquiry) also dated February 8, 1988 requesting parties to inform the Court their contentions and related motions regarding "what effect, if any, Penn's voluntary dismissal of their bankruptcy case had on the viability of the appeal.

2-14-89 Penns responded to District Court Inquiries as well as filing Appellants Objections to Appellee's Motion to Dismiss;

both documents held an inclusion of motion to transfer to the 7th Circuit while both documents responded to the fact the Penn's "voluntary dismissal" of their bankruptcy case had "no effect whatsoever" on the viability of appeal, for there were no issues under bankruptcy court jurisdiction in regard to th creditor at the time the Penns sought dismissal for the Penn's disputes against the claim of the bank (adversary proceeding #87 0481) entered district court jurisdiction March 15, 1988. The Bankruptcy Court allowed the Bank a lifting of stay from the Penn's Bankruptcy Case August 18, 1988; and the District Court refused to stay the Bankruptcy Court's August 18, 1988 Judgement in it's Order of September 1, 1988; and further nullified the Penns attempts to appeal the District Court's decision 12-16-88. Wherefore, the related Courts are responsible for any endangerment to the concerns of the Penns and there was no reason for the Penns to remain a target for further fraudulent acts in the the Bankruptcy Court.

Thereafter, the District Court did not respond to either the Bank nor the Penn's motion.

On February 17, 1989, the Parke Circuit Court entered it's findings and judgement of case #85-C-13. (A-56-63). Again, the Penns were prosecuted and adjudged on the merits of a contract against public policy. The Bank's invalid claim of which they elected to enforce in January 1985 with alledged indebtedness of $53,618.84, had escalated from the Bankruptcy Court's findings of claim amount $70,845.93 -- to State Court's findings of $79,809.52. (Of course the Penns were entitled to the $2,500.00 set-off for "minor technical violations" of the UCCC as Bank stipulated to Court.) The Penns pro-

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In State Court Penns properties were ordered sold without relief whatsoever of valuation or appraisement laws with judgement bearing interest at the rate of 10%. In the event said mortgaged premises failed to sell for the sums sufficient to pay and satisfy judgement together with costs, interest and accruing costs, the residue thereof was Ordered to be levied out of the goods chattels, lands and tenaments of Penns and any sell thereof was Ordered to be sold without relief whatsoever of valuation or appraisement laws.

perties were ordered to be sold by the Sheriff of the County of Parke and said sale was thereafter held April 10, 1989 whereby Bank was the high bidder and came into possession. (Prior to said Sheriff sale the Penns had duly appealed the Trial Court's findings in Indiana Appellate Court Case #61A01-8903-CV 00081 and the Appellate Court had Granted the Penn's Motion of Stay upon the conditions set forth by the Appellate Court, however, Penns could not secure the bond as was condition set forth by the appellate court within the three day time span allotted.)

February 28, 1989 the Bank submitted to District Court a supplimental brief in support of it's motion to dismiss, attaching the state court findings. Bank then asserted:

> "the validity and the extent of the Bank's security interest in real estate has been adjudicated in the foreclosure proceedings in Parke County with identical findings as Judge Otte. These were made after an evidentiary submission and not based on res judicata," ..."There is no practicl effect to continuing or deciding this appeal because it origionated solely from the now dismissed chapter

11 proceeding and because the issue could only relate to that proceeding."

Again the Penns responded to the Bank's wanton alledgements with repeated motion to Court and stipulated offer to Court. Again, the District Court did not respond.

September 29, 1989, (7½ months after the Penns properties had been successfully defrauded in State Court) U.S. District Court Judge Sarah E. Barker entered her final decision of case # IP88-299C. Said decision first addressed the Bank's Motion to Dismiss before addressing thee Appeal itself. (A13-32). The Bank's Motion to Dismiss the appeal was DENIED, while the Bankruptcy Court's Judgement of Adversary Proceeding #87-0481 March 4, 1988, was AFFIRMED. The District Court responded to the Penns disputes in the following manner:

> "This Court has reviewed the evidentiary matters on which Judge Otte's findings were based and finds the appeal of his decision to be so meritless as to be nearly frivolous. The Penns object to the scope and stipulations entered into by their attorney, but such objection comes too late."..."The

> reason for failure to award damages is patently clear from the record, there was no evidence of damages"..."The Penns appellate brief and reply brief contain numerous complaints about the preformance of their attorney who they alledge "suppressed" information which they would like to present. This argument has no place on appeal"...."The Penns final catagory of complaints in this appeal concerns the Penns claims of "irregularity and illegality" in the in the proceeding including further misdeeds of their attorney, the improper recusal of Bankruptcy Judge Kearns, and a conspiracy to defraud them by Bank's attorney, their attorney and Judge Otte. They recast a list of legal wrongs they claim to have suffered at the hands of the Bank but offer no coherant argument or support for this spurious assertation."..... "Throughout the appeal the Penns have sought to derail the foreclosure proceedings in Parke County. Our Court of Appeals has acknowledged the importance of State Foreclosure Proceedings being given due respect even while Bankruptcy Proceedings are pending."

The Penn's duly appealed the September 29, 1989 final judgement of Sarah E. Barker, U.S. District Court Case # IP88-299C, to the Seventh Circuit United States Court of Appeals. Said was docketed as Appellate Case #89-3396. In Briefs, the Penns argued and evidenced the following issues:

"1. Did the U.S. District Court Act in Collusion and Determine to be Legal, Fraudulent Behavior Between Bank, Attorneys, & Federal Judge in the Indianapolis Division of the U.S. Bankruptcy Court."

"2. Did the Parke State Bank, Attorneys and Judges in the Indianapolis Division of the U.S. Bankruptcy Court and U.S. District Court Act in Collusion and Conspire in a Scheme to Defraud the Debtor/Appellant?

Throughout the pendancy of the 7th Circuit and Indiana Appellate Court Appeals, the Bank sold Penns properties to outside buyer. Although the Penns informed outside buyer that said properties were pending litigation and there was no lawful transfer of title the Penns information was disputed by Bank and Parke Circuit Court representatives and sold. Thereafter, the buyers found said litigation pending and refrained from moving into said residence pending the outcome of litigation.

June 18, 1990, the Indiana Appellate Court entered it's Memorandum Decision of Appellate Case #61A01-8903-CV00081. Said decision was broadly stamped **NOT FOR PUBLI-**

cation and addressed the Penns grievances in the following manner: (A-75-80).

> "The Penns first claim the trial court erred in exercising jurisdiction to decide the foreclosure action while there was an adversary proceeding pending appeal in in the U.S. District Court in the southern District of Indiana. The Penns base their argument on IND. Code 34-1-53-7...We disagree with the Penns that IND CODE 34-1-53-7 applies to the facts of the present case....The Bank by filing its proof of claim in the bankruptcy court was merely seeking to establish it's claim as a secured creditor in the bankruptcy proceedings. Such action does not amount to "prosecuting" any other action for the same debt. The Bank was not "prosecuting" the bankruptcy action. Accordingly, it was entitled to pursue it's foreclosure action in the state court. The trial court properly exercised it's jurisdiction to decide the Bank's foreclosure action despite the pending appeal of the adversary proceeding in federal court."

The Indiana Appellate Court failed to respond to 13 out of the 15 violations of the UCCC argued by the Penn's in support of their contenion of "Contract Against Public Policy"; the Indiana Appellate Court rather concluded as follows:

> "The Penns further assert the trial court erred in enforcing a contract against public policy.

Apparently, the Penns argue that the note and mortgage were against public policy because they contained an acceleration provision in the event of default which resulted in the Penns being wrongly deprived of their property. The Penns argument is without merit because of this Courts decision in Streets v M.G.I.C. Mortgage Corp. (1978), 177 Ind. App. 184,188, 138 N.E.2d 915, where we held that:

> **"A provision in a mortgage or note which allows acceleration of the entire debt upon a default or breach of the term or mortgage does not in itself constitute a penality of forfeiture and does not violate public policy. Such a provision is enforceable both in this state...and as a general rule."**

"Finially the Penns advance allegations of fraud, collusion, misrepresentation and violations of their Constitutional Rights by the Bank, attorneys andd judges involved in this case. These issues may be res-judicata due to the District Court's decision on similiar issues raised by the Penns in their appeal of the Bankruptcy Proceedings. Nonetheless, we can find nothing in the record and the Penns fail to provide us with citations to the record in support of their assertations. Accordingly, we find the Penns allegations to be without merit".

The Bank requests that this Court award attorney fees the Bank occurred in defending this appeal. Both the mortgage and the note provide that in the event of default , the borrower is responsible for attorney fees. This Court has recently recognized that

"A contractual agreement for a payment of attorney fees includes payment of appellate fees."
Seibert v Mock (1987), Ind. App., 510 N.E. 2d 1373. Accordingly, the Bank is entitled to a remand to the trial court for a determination of reasonable attorney fees.

The Trial Court's Judgement is AFFIRMED and the cause REMANDED for a hearing to determine reasonable attorney fees."

"Robertson, J. and Sullivan, J. Concur."

The Penns duly filed Petition to the Indiana Supreme Court for Direct Review of the June 18, 1990 final judgement of Indiana Appellate Case #61-A018903-CV00081.

IN AN UNPUBLISHED ORDER DATED AUGUST 7, 1990, the SEVENTH CIRCUIT UNITED STATES COURT OF APPEALS issued it's final decision regarding it's appellate case # 89-3396. Said findings not only **DISTORTED** the true facts of the matter which was before it's Court but **REVERSED** the District Court's decision of a **res judicata** issue which Bank **FAILED TO CROSS-APPEAL** IN THE Seventh Circuit Case. (See A1-10).Thereafter, by virtue of the distortion and the reversal of said

res judicata issue, the Seventh Circuit United States Court of Appeals deemed the appeal as "moot"; the Penn's appeal frivolous; awarded the Bank "double costs"; and REMANDED said case back to the District Court for DISMISSAL.

Significant portions:

> "On November 2, 1985, the Penns filed a petition for Bankruptcy under Chapter 11 of the United State Bankruptcy Code. Pursuant to 11 U.S.C. s 362, this filing stayed foreclosure proceedings the Bank had initiated in Indiana state court. The Bankruptcy Court approved a preliminary agreement of Adequate Protection between the two parties which required the Penns to continue making payments on their home. On March 16, 1987, the Bank filed a claim in Bankruptcy Court because the Penns failed to abide by the agreement and the Penns filed an objection. On March 4, 1988, the Bankruptcy Court held a hearing on the Penn's objection to the claim and found that the Bank had a net secured claim of $68,346.00. The Bankruptcy Court's order, which had the effect of allowing the Bank to proceed with its foreclosure action in state court, was functionally an order lifting the automatic stay, and we will construe it as such. The Penns then filed a notice of appeal to the District Court from this order, and the Bank went on to successfully litigate it's foreclosure action. In

> an Unpublished Order the Indiana Appellate Court recently affirmed the Circuit Court's decision.".....
>
> On September 29, 1989, the District Court ruled on the order of the Bankruptcy Court lifting of stay. The Court denied the Bank's motion to dismiss for mootness, relying on..."
> The District Court, however, did not address the issue of mootness, which we believe to be dispositive of the case. The test for mootness is whether the relief sought would make a difference to the legal interests of the parties,"..

On September 24, 1990 the Seventh Circuit United States Court of Appeals DENIED the Appellants **Pet**ition for Rehearing. (A-11). Due to service by mail of said Denial the Penns did not have time for adequate prepar al of an application of Stay before the 7th Circuit's mandate issued. Therefore, the Penns filed Verified Petition to Recall and Stay the Mandate issued 10-2-90 pending Review of the United States Supreme Court by Writ of Certiorari. October 15, 1990, the Seventh Circuit United States Court of Appeals DENIED Appellant's Petition to Recall and Stay Mandate, (A-12) and thereafter,

U.S. District Court Judge Sarah Evans Barker DISMISSED this case as ordered by the Seventh Circuit United States Court of Appeals.

At approximately 11:30 p.m. on October 17, 1990, the Penn's received a telephone call from their former next-door neighbors informing Penns their home (subject of this dispute) was engulfed in flames. The Penns followed a succession of fire engines to their home and watched as the roof caved in on all they had built to achieve.

On October 18, 1990, the Indiana Supreme Court Denied the Appellant's Petition for Direct Review of Indiana Appellate Case #61A01-8903-CV00081. Said was Ordered by Chief Justice Randall T. Shepard with further statement of ALL JUSTICES CONCUR.

Suspicious, the Penns sought the fire chief's determination of cause of fire on their home. His determination of arsen was stated to be under investigation by State Fire Marshall.

In conclusion, the Penn's are seeking writ of certiorari to the Seventh Circuit

United States Court of Appeals for the review of the August 7, 1990 Unpublished Order of Appellate Case # 89-3396.

Reasons Relied Upon for Allowance of the Writ

1. **The Penns feel the Seventh Circuit United States Court of Appeals has departed from the accepted and usual course of proceedings in the mannerism by which it sanctioned such a departure from the lower court.**

i.e. Appendix page 35 (U.S. Bankruptcy Court Transcript of Trial, Adversary Proceeding #87-0481)exposes the fact the Penns were **current** on their adequate protection payments on trial date, and the Seventh Circuit's findings were distorted.

Appendix pages 102-104 exposes the fact the Bank was allowed a lifting of stay five months **after** the Penns appealed the Bankruptcy Court's final judgement of Adversary Proceeding #87-0481 to the U.S. District Court and the Seventh Circuit's findings were distorted.

Appendix pages 13-20 evidences the fact the District Court **did address** the Bank's issue of "mootness" and the Seventh Circuit's

findings are distorted.

By the provisions of Fed. Rule App. P. "X". (See in appendix page 123) the Seventh Circuit United States Court of Appeals **did not have the power to reverse the decision of the U.S. District Court for the issue of "Moot" was res judicata due to the Bank's failure to file a cross-appeal of this issue in the Seventh Circuit Case # 89-3396.**

In short, it is the feelings of the Penns the Seventh Circuit United States Court of Appeals findings of case #89-3396 undermines the very purpose of the power of the bankruptcy court: (A-121)

> **"Equitable powers of the Bankruptcy Court should be applied to end that fraud will not prevail, that substance will not give way to form and that technical considerations will not prevent substantial justice from being done."** (Penn Cent. Transp. Co., D.C. Pa. 1972, 346 F. Supp. 1330.)

Wherefore, the petitioner prays the United States Supreme Court to grant the writ of certiorari and determine the questions presented for review for said questions are a matter of great public concern.

Respectfully submitted,

Patsy S. Penn

Mr. and Mrs. Robert E. Penn
Robert E. Penn
Patsy S, Penn, Petitioners

APPENDIX

APPENDIX

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No. 89-3396

UNITED STATES COURT OF APPEALS
for the SEVENTH CIRCUIT

Robert E. Penn, and Patsy S. Penn debtor /appellant v The Parke State Bank appellee	)	UNPUBLISHED ORDER filed August 7, 1990

Before: John L. Coffey, Circuit Judge
Joel M. Flaum, Circuit Judge
Wilbur F. Pell, Jr., Senior Cir. Judge

ORDER

Debtor/appellants, Robert and Patsy Penn appeal from the District Court's decision affirming the Bankruptcy Court's Order which lifted an automatic stay as to the creditor, the Parke State Bank (Bank). Because the Penn's voluntarily dismissed in bankruptcy court their chapter 11 bankruptcy petition subsequent to filing their appeal in the district court, we hold the appeal is now moot. We reverse the decision of the district court on the merits and remand for a dismissal.

On November 2, 1985, the Penns filed a petition for Bankruptcy under Chapter 11 of the United States Bankruptcy Code. Pursuant to 11 U.S.C. s 362, this filing stayed foreclosure proceedings the Bank had initiated in Indiana state court. The Bankruptcy Court approved a Preliminary Agreement of Adequate Protection between the two parties which required the Penns to continue making payments on their home. On March 16, 1987, the Bank filed a claim in Bankruptcy Court because the Penn's failed to abide by the agreement, and the Penns filed an objection. On March 4, 1988, the Bankruptcy Court held a hearing on the Penn's objection to the claim, and found that the Bank had a net secured claim of $68,346.00. The Bankruptcy Court's

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after preliminary examination of the briefs, the Court notified the parties that it had tentatively concluded that oral argument would not be helpful to the Court in thi case. The notice provided that any party might file a "Statement as to the Need of Oral Argument". See Fed. R. App. P. 34(a); Circuit Rule 34(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

order, which had the effect of allowing the Bank to proceed with it's foreclosure action in state court, was functionally an order lifting the automatic stay, and we well construe it as such. The Penns then filed a notice of appeal to the district court from this order, and the Bank went on to successfully litigate it's state foreclosure action. In an Unpublished Order, the Indiana Appellate Court recently affirmed the Circuit Court's decision. Penn v the Parke State Bank, No. 61A01-8903-CV81 (Ind.App. June 18, 1990). On January 4, 1989, while the appeal before the district court was still pending, the Bankruptcy Court granted the Penn's motion to voluntarily dismiss their Chapter 11 proceedings.

On September 29, 1989, the district court ruled on the order of the bankruptcy court lifting of stay. The court denied the Bank's motion to dismiss for mootness, relying on In re Stardust Inn, Inc. 70 B.R. 888, (E.D. Penn. 1987), which holds that when an adversary proceeding is pending in the bankruptcy court

and the Chapter 11 proceedings from which the adversary proceeding emanuated is dismissed, the fate of the adversary proceeding lies within the discretion of the court in which the adversary matter is pending. The district court gave several reasons for deciding that it had jurisdiction over the appeal dispite the dismissal of the underlying action. Initially the Court noted that the bankruptcy court's order did not purport to dismiss the appeal. The court also concluded that the Penn's did not want the appeal dismissed given their failure to file a motion to dismiss in the district court pursuant to Bankruptcy Rule 8001(c). The Court also stated that the Penns claims against the Bank were litigated first before the Bankruptcy Court. After finding it had jurisdiction,

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The Bankruptcy Court's Order Granting Debtor's Motion of Dismissal provides "the Debtors' filed their motion of dismissal on December 7, 1988. The Court sent a notice dated December 12, 1988, to all creditors and parties in interest which informed them of the debtors' motion of dismissal and gave them up to and including January 3, 1989, in which to object

the district court affirmed the bankruptcy court's order, and the debtor took a timely appeal to this Court.

A threshold question is whether the bankruptcy court's order lifting the stay is a final order. Although appellant jurisdiction in bankruptcy cases is a murky subject, Kham & Nates Shoes No.2, Inc. v FirstBank of Whiting, No.89-3001, slip op. at 4 (7th Circuit July 19, 1990), this Court has held than an order lifting a stay is a final order for the purpose of appellate review under 28 U.S.C. s 1293(b), the precurser of 28 U.S.C. s 158. Matter of Boomgarden, 780 F. 2d 657,660 (7th Cir. 1985). In that case we adopted the reasoning of In re American Mariner Industries, 734 F.2d 426,429 (9th Cir. 1984), which examined the provisions of the bankruptcy code for expidited and exparte proceedings in complaints for relief from an automatic stay see

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to the debtors motion. No objections were filed on or before the time specified. Accordingly, the Court GRANTS the Debtors' Motion of Dismissal and FURTHER ORDERS that the Chapter 11 proceeding is DISMISSED."

section 362, and concluded that Congress intended the Courts to adjudicate conclusively and expiditiously, apart from the bankruptcy proceedings, complaints for relief from automatic stay. Id. at 429. Therefore, we hold that a bankruptcy court's decision on a claim which has the effect of lifting an automatic stay under section 362(d) is a final decision.

The next question we must address is whether the bankruptcy court had jurisdiction to grant the Penns motion to dismiss the chapter 11 proceedings once the Penns filed the appeal to the district court. The general rule is that a pending appeal of a bankruptcy decision deprives the bankruptcy court of jurisdiction over issues involved in the appeal. Matter of Commodore Corp, 86 B.R. 564 (N.D. Ind.1988). This general rule however, does not stand for the proposition that a bankruptcy court lacks jurisdiction to grant a dismissal of the chapter 11 proceedings when the debtor brings the motion to dismiss and all creditors agree that dismissal was proper.

Finially, we address the question of whether the district court had jurisdiction to reach the merits of the appeal once the Chapter 11 proceedings had been dismissed by the bankruptcy court. As a general rule, the dismissal of of the bankruptcy case results in the dismissal of all "related proceedings" because the court's jurisdiction of the latter depends upon the nexus between the underlying bankruptcy case and the related proceedings. In re Smith 866 F.2d 576,580 (3rd Cir. 1989). Of course the appeal from the order lifting the stay was such a related proceeding. But the district court went on to address the question of whether the court may exercise it's discretion to retain jurisdiction over such related claims after the termination of bankruptcy proceedings. The few Bankruptcy Courts that have addressed this issue have held that the general rule that dismissal of a bankruptcy case terminates all adversary proceedings filed in the case is not without exception. See e.g., Stardust Inn, 70 B.R. at 8912; In re Pockington, 21 B.R. 199,201 (S.D. Cal.1982).

Drawing upon an analogy to the disposition of ancillary and pendant claims, these courts have held that they may consider a number of factors to determine whether jurisdiction should be retained. These factors include: (1) judicial economy; (2) fairness and convenience to the litigants; and (3) the degree of difficulty of the related legal issues involved. Stardust Inn, 70 B.R. at 891. The district court in this case weighed these factors and determined that justice would be best served by addressing the merits.

The district court, however, did not address the issues of mootness, which we believe to be dispositive of the case. The test for mootness is whether the relief sought would make a difference to the legal interests of the parties, as distinct from their psyches which may remain deeply engaged in the merits. Airline Pilots Ass'n v UAL Corp., 897 F.2d 1394,1396 (7th Circuit) citing North Carolina v Rice, 404 U.S. 244,246 (1971). If it would make no difference at all to those interests

then a federal court is not really deciding a "case," and is exceeding the power conferred on it by Article III of the Constitution. UAL Corp.,897 F.2d at 1396. Declaring such a case moot and without relief not only gives expression to the policies thought inherent in Article III, but also the notion of judicial economy mentioned in the bankruptcy decisions.

In this case the dispute which forms the basis of the appeal no longer exists. Their protestations before this court to the contrary notwithstanding, the debtors no longer sought the protection of the bankruptcy laws once they filed the motion for voluntary dismissal. The creditors by failing to object to the voluntary dismissal, seem colntent to pursue their remedies against the debtors elsewhere. Once the Chapter 11 proceedings were dismissed, any question in the federal courts regarding the Bank's claim and the lifting of stay vanished. Furthermore, the Bank has already won it's foreclosure action in state court. Therefore, we conclude that the case is moot and the district court erred

in reaching the merits.

Finially, the Bank has moved for sanctions on appeal pursuant to Fed. R. App. P. 38. We agree that this appeal was frivolous and therefore grant the motion. We deny the Bank's request for attorney fees and instead award it double costs.

For these reasons we VACATE the decision of the district court and REMAND so that the appeal may be dismissed for want of subject matter jurisdiction.

John L. Coffey, Circuit Judge
Joel M. Flaum, Circuit Judge
Wilbur F. Pell, Jr., Senior Circuit Judge

No. 89-3396

UNITED STATES COURT OF APPEALS
for the SEVENTH CIRCUIT

Robert E. Penn, and Patsy S. Penn debtor/appellant	)	Filed
v	)	September 24, 1990
The Parke State Bank appellee	)	

Before: John L. Coffey, Circuit Judge
Joel M. Flaum, Circuit Judge
Wilbur F. Pell, Jr., Senior Cir. Judge

ORDER

On consideration for the petition for rehearing and suggestion for rehearing in banc filed on August 21, 1990, no judge in active service has requested a vote thereon, and all the judges on the origional panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED, that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

NO. 89-3396

UNITED STATES COURT OF APPEALS
for the SEVENTH CIRCUIT

Robert E. Penn, and Patsy S. Penn Debtor/appellant	)	Filed
v	)	October 15, 1990
The Parke State Bank Appellee	)	

Before: Not Stated on Document

This matter comes before the court for its consideration of the "VERIFIED PETITION TO RECALL AND STAY THE MANDATE ISSUED 10/2/90 PENDING REVIEW OF THE UNITED STATES SUPREME COURT" filed herein on October 10, 1990, by the pro se appellants. On consideration thereof,

It is ORDERED that said petition is DENIED. The denial is without prejudice to the appellant's right to petition for certiorari.

No. IP88-299C

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

Robert E. Penn, and Patsy S. Penn debtor/appellant	)	Filed
v	)	September 29, 1989
The Parke State Bank appellee	)	

Before: Sarah Evans Barker, Judge
U.S. District Court

ENTRY AND DECISION

This matter is before the court on the appeal of Robert and Patsy Penn from the decision of Bankruptcy Judge Frank J. Otte entered March 4, 1988, granting in part and over-ruling in part the objection of the debtors Robert and Patsy Penn to the claim of the Parke State Bank.

Based on the developements in the bankruptcy court after this appeal was commenced, the Parke State Bank seeks the dismissal of this appeal.

The Court, being duly advised, now DENIES

the Parke State Bank's motion to dismiss this appeal and AFFIRMS the Bankruptcy Court's Order.

THE BANK'S MOTION TO DISMISS

Background and contentions

On February 8, 1989, this Court made the following comments regarding the developements in this action:

> The record on appeal from the United States Bankruptcy Court has been supplimented on January 6, 1989 by the submission from the Bankruptcy Court of an "Order Granting Debtors' Motion of Dismissal" signed by Judge Otte on January 4, 1989. Such Order recites that the debtors' filed a motion of dismissal on December 7, 1988, and that no objections were received to the motion. Judge Otte's Order then ordered "this Chapter 11 proceeding....DISMISSED".
>
> The parties have taken no steps to suppliment the record on appeal before this Court. Neither party has moved to dismiss this appeal or to inform the Court of what, if any, effect Judge Otte's Order of January 4, 1989, has on the issues and viability of this appeal. Nor has either party suggested that the Bankruptcy Court was without jurisdiction to dismiss the action once the District Court obtained jurisdiction through the appeal filed by the debtors. Each and all of these issues are properly subject of inquiry by the Court, and may in fact be dispositive of the appeal itself. The Court

finds it inappropriate to proceed further without the benefit of the parties views and their motions (if warrented) on these matters.

The same day, February 8, 1989, the Bank filed it's motion to dismiss, reciting the dismissal entered by the Bankruptcy Court and stating that the issue in this appeal was "moot" since the debtors are no longer using the Chapter 11 process to resolve their claims and disputes with creditors. Furthermore, the issue being appeal relates to the Court's determination of a creditor's claim, which is uniquely related to the Chapter 11 process." The motion continued by asserting that the dismissal of the Chapter 11 proceeding "terminates the debtor's (sic) right to use the provisions of the Bankruptcy Code for resolution of it's (sic) claim with creditors and the remedy available to debtors, subsequent to such dismissal, are the remedies afforded under normal non-bankruptcy law".

On February 14, 1989, the Penns respnded to the Bank's motion to dismiss and the Court's Order of February 9, 1989. Although rambling

and conclusory, the response makes clear the Penn's contention that the Order granting the dismissal of the Bankruptcy Court "HAS NO EFFECT in regard to the issues and viability of this appeal".

The Bank supplimented it's motion to dismiss with a brief filed February 28, 1989. In that brief the Bank argues the dismissal of the present appeal is discretionary, that foreclosure action against the Penns was concluded in the Parke Circuit Court in February 17, 1989 with the entry of degree of foreclosure and that the circumstances of this action the appeal should be dismissed.

DECISION

The threshold determination which must be made is how the dismissal of the Chapter 11 proceeding affects the appeal of the adversary proceeding involved in the present appeal. If the Bankruptcy Court was without jurisdiction to enter an order affecting the appeal of the adversary proceeding or if the dismissal of the Chapter 11 proceeding does not render the appeal futile then plainly the appeal

must be decided.

Initially we note that the Bankruptcy Court's order did not purport to dismiss the appealfrom the disposition of the adversary proceeding. We can, therefore, avoid an inquiry into the extent of that Court's authority to enter an order which would effect the jurisdiction of the district court to proceed to a determination of an appeal which has been docketed.

Secondly, the Penns have made clear their intent that the appeal in the district court not be affected by the dismissal in the Bankruptcy court. The procedure for the voluntary dismissal of an appeal after docketing in the district court is set forth in Bankruptcy Rule 8001(c): "After the appeal has been docketed, it may be dismissed by the appellate court on agreement, or on motion of the appellant, on such terms and conditions as the appellate court may impose." This procedure was not followed.

Bankruptcy Rule 8001(c) is patterned after *F.R.App.P.42(c). In resolving one

aspect of the Bank's motion to dismiss, we now adhere to the decisions in the district and appellate court's under Rule 42(c) and find that whatever the Bankruptcy Court's Order of January 4, 1989 did, it does not compel the dismissal of the present appeal since jurisdiction had already passed to the District Court.

The Bank argues, however, that there is no practical effect to continuing or deciding this appeal because it origionated solely from the now-dismissed Chapter 11 proceeding and because the issue decided in the appeal could relate only to that proceeding. In addition the Bank points out that the validity and extent of the Bank's security interest in the real estate has been adjudicated in the foreclosure proceeding in Parke County with identical findings as made by Judge Otte. These

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In it's motion to dismiss the Bank stated that the Order of Dismissal in the Bankruptcy Court "terminate(d) the (Penn's) right to use the provisions of the Bankruptcy Code" to litigate claims against their creditors, including the Bank. To the extent this argument suggests that the dismissal of this appeal is compelled, that argument is rejected.

were made after an evidentiary submission and not based on res judicata. The judgement entered by the Parke Circuit Court is being duly appealed to the Indiana Court of Appeals.

Other considerations, however, suggest that the appeal should be decided on the merits. These are that the Penn's claims were litigated first before Judge Otte, that the Penn's have attacked the integrity and procedures of the bankruptcy process in their case, that dispite the "voluntary" dismissal of their Chapter 11 proceeding they wish to proceed in Federal Court and finially, that the claims have in fact been decided by the Bankruptcy Court here.

When an adversary proceeding is pending and the Chapter 11 proceeding from which the adversary proceeding emanuated is dismissed, the fate of the adversary lies within the discretion of the Court in which the adversary matter is pending. In re Stardust Inn, Inc., 70 (Bankr.E.D. Penn. 1987). In the exercise of that discretion a court may consider factors such as judicial economy, fairness, and

convenience to the parties and the degree of difficulty of state law issues involved. Id. No different rule appears warrented where the adversary proceeding has been decided and is on appeal. Therefore, in the exercise of the District Court's discretion in this matter, we will proceed to decide the appeal on the merits and in doing so will DENY the Bank's motion to dismiss in it's entirety.

THE APPEAL

On March 4, 1988, the Bankruptcy Court made the following disposition of the Penn's objection to the allowance of the claim of the Bank:

1. The objections to the claim filed by the Parke State Bank are SUSTAINED IN PART and DENIED IN PART.
2. The Parke State Bank has a secured claim in this action in the amount of $70,845.93 less a set-off of $2500.00, for a net secured claim of $68,345.93.

The Penns now present myraid claims concerning the correctness of this determination, the representation of their attorney, and the procedures of the Bankruptcy Court.

DECISION

The Disrict Court has jurisdiction over the Penn's appeal pursuant to 28 U.S.C.s158(a). In disposing of such appeal this Court"...may affirm, modify, or reverse a bankruptcy Court's judgement order, or decree or remand with instructions for further proceedings." Rule 8013 of the Rules of Bankruptcy Procedure.

In reviewing the decision of the Bankruptcy Court this Court must accept the Bankruptcy Court's findings of fact unless they are clearly erroneous, In re Kimzey, 761 F.2d 421,423 (7th Cir.1985); F.R.App.P.8013, but reviews de novo such court's conclusions of law. In re Tynan, 773 F.2d 177,178 (7th Cir. 1985). In sitting as a court of review over the bankruptcy court, the district court has the power to consider any issue presented by the record,even if the issue was not presented to the bankruptcy court. Matter of Pizza of Hawaii, Inc., 761 F.2d 1374,1379 (9th Cir. 1985). The exercise of this power is especially appropriate here, where the Penn's commenced and continue in this appeal pro se and

where the unusual content of the record questions--at least according to the Penns--the fairness of the proceedings before the Bankruptcy Court.

There are three basic claims to this appeal--the correctness of Judge Otte's findings and Order, the fairness of the bankruptcy procedures and the actions of the Penn's attorney. Within each claim the Penn's have asserted made numerous contentions, many of which overlap.

We will first consider the Penns challenge to Judge Otte's findings and Order. The Penn's complaint was drafted in four counts. Count I alledged the Bank's violation of Regulation z of the Truth in Lending Act, Count II alledged the Bank's violation of the Indiana Uniform Consumer Act, Count III alledged the Bank's willful and intentional misallocation of payments on the mortgage loan by the Bank, and Count IV alledged malicious prosecution by the Bank it having filed a foreclosure action against the Penns in December 1983.

Council for the Penns and for the Bank

properly stipulated to much of the documentary evidence at trial. Additionally, the Bank admitted both before and at trial it's technical violations of Regulation Z and of the Indiana Consumer Credit Act and the council for the parties entered into a written stipulation concerning the following: (1) that the promissory note and mortgage were validly executed by the Penns and were given adequate consideration; (2) that the principal balance of the promissory note was correctly stated at $67,345.93 "except for the specific matters alledged in the Penn's complaint"; and (3) at the time the Bank filed it's foreclosure action identified in Count IV of the complaint the Penns were deliquent in their mortgage payments for the months of August, September, October and November 1983. This stipulation also identified the issues "requir(ing) resolution by the Court".

It was against the background of these stipulations and the testimonial evidence that Judge Otte entered his findings on the record at the conclusion of the trial, first as to

Counts III and IV and then as to Counts I and II:

> Taking Count Three as set out here, the issue being, Did the Defendant's actions in reallocating a previously settled payment violate the implied covenants of good faith and fair dealing? The Court finds that there was no evidence of that presented by either party and that therefore I must rule for the Defendant and find that there was no violation of implied covenant of good faith and fair dealing....Now as to Count Four, was the Defendant's initiation of a foreclosure action or proceeding on December 20th of 1983 without probable cause? The history of payment of this loan from the beginning in 1976 is a history of very erratic payments ....And I believe the Bank had every cause it needed to file that foreclosure action in December of '83 on a loan that was admittedly, by all parties, deliquent at the time. On Count Four, Did the Defendant's initiation of foreclosure proceedings breach a previously established course of dealing with the Plaintiffs without prior notice?....Now, it is true that for....the Bank did accept late payments, but there is a point in time when enough is enough. And the loan was behind at the time that foreclosure action was filed. The documents call for acceleration. Foreclosure is the proper procedure to accelerate and to foreclose on the mortgage. And I think the evidence is clear that the Bank certainly was within it's rights to do so. And I do not believe that it violated any prior established course of dealing with the Plaintiffs. As to Count Four, Did the Defendant's initiation

of foreclosure proceedings breach a previous verbal agreement? The Court finds that it did not....and I don't believe that any verbal agreement was established by the evidence ....Now was the Defendant's initiation of a foreclosure proceeding motivated by malice toward the Plaintiffs? And I find no evidence of that....And did the Defendant's initiation of foreclosure proceedings cause injury to the Plaintiff's personel and business dealings?...There just wasn't anything that this Bank did that aggravated, caused, or in any way, in my judgement, affected their business dealings or caused any injury to them....I find that the amount of the claim that is going to be allowed with certain deductions to be as follows. And we have already had some discussion here on the record concerning the interest on some $9,900, and the Court will not add any interest to that. However...I'm going to make the attorney fees fees $3,500 for a total amount of $70,845.93...As to the allegations that the Bank violated the truth in lending and the Uniform Commercial Code as enacted in Indiana, the Bank has stipulated that such violations occurred and so characterize those violations as technical violations ....Therefore, the improper disclosures were not a result of a bona fide error, and the Bank cannot escape liability for them. Now the Penns have completely and totally failed to show any damages resulting to them because of the improper disclosures...I think that the Penns, because there wasa violation, are entitled at most to $1000 damages pursuant to 15 U.S.C. section 1540, subparagraph A(2)(a), plus costs and reasonable attorney fees pursuant to

> section 1640A(3). An in addition to an award under the truth in lending act, the Penns may also recover for violation under the UCCC. So therefore, Induiana Code 24-45-5-203 provides the same damages as would be available under the truth in lending known as TILA. There is no more than $1000 for this particular transaction because again, I think, that the Penns have failed to establish any other damages...And therefore, although the Court finds the improper disclosures to be quite minor and the fact that such violations can be subject to a Federal lawsuit positively ludicrous, the Court is required by law to award the Penns a set-off of $2000 against the claim of the Bank...The Court believes that a fair and equitable award for the time expended by (the Penn's attorney) on the truth in lending issue and the UCCC issue given the fact that the Bank has stipulated the violations is $500.00. So in conclusion, the Penn's may off-set the claim of the Bank by $2,500.00.

(Trial record at 99-107).

This Court has reviewed the evidentiary matters n which Judge Otte's finding were based and finds the appeal of his decision to be so meritless to be nearly friviolous. The Penn's object to the scope and substance of the stipulations entered into by their attorney, but such objection comes too late. Apart from this, the stipulation appears to track

the documentary evidence which was not disputed and the evidence of deliquency in the Penn's mortgage payments in 1983, which was also undisputed. Judge Otte's determinations concerning the absence of factual support for the claims raised in Counts III and IV of the Penn's complaint is not clearly erroneous and may therefore not be disturbed on appeal. Based on these findings his further decision that the Penn's could not prevail on Counts III and IV was proper.

The Penn's appeal concerning the disposition on Counts I and II of their complaint focuses on Judge Otte's finding that there had been a failure to show damages from the improper disclosure and his decision to award only $1000 for each violation (plus $500 in attorney fees). This award was based on statutory penalty and not a showing of damages. The reason for the failure to award damages is patently clear from the record. There was no evidence of damages. There was not even a question concerning damages or consequences from the violation of the Truth in Lending

regulation or the UCCC. The Penn's discontent with the evidence does not change the record. The record fully support Judge Otte's decision that no further award under these statutory provisions was warrented.

The Penns appellate brief and reply brief contain numerous complaints about the preformance of their attorney, who they alledge "suppressed"information which they would now like to present. This argument has no place on appeal. The Penns chose their attorney. The adversary proceeding was pending for well over a year before coming to trial. The Penns were present and testified at trial. They are bound by the actions and decisions of their council, although it is not amiss to suggest that their council did preform well in the face of what were at best feeble and technical claims.

The Penn's final catagory of complaints in this appeal concerns the Penn's claims of "irregularity and illegality" in the proceeding, including further misdeeds of their attorney, the improper recusal of Bankruptcy

Judge Kearns and a conspiracy to defraud them by the Bank's attorneys, their attorney, and Judge Otte. They recast a list of legal wrongs they claim to have suffered at the hands of the Bank but offer no coherant argument or support for this spurious assertation.

This Court notes that Judge Kearns recusal was entered on it's own motion and under circumstances which are completely explained. While that action was taken in an abundance of caution, it cannot be said to have been improper. The record further shows that while the Penns were represented by council that the matter progressed in an orderly manner. The stipulation suggests no collusion and was not improper. On the contrary, the preparation of council served precisely the purpose of pretrial proceedings, to narrow as much as possible the legal and factual issues to be decided. Likewise, the Bankruptcy Judge's conduct of the trial was attentive, fair, and tolerant. Time and again Judge Otte would consider whether to exclude evidence proffered by the Penns, but permit it explaining he

would "sift it out later". The exercise of his discretion in this manner illustrates his balanced and fair handling of the action.

Following the decision of the Bankruptcy Court on the Bank's claim and the Penn's objection, the Penn's elected to proceed pro se. They have proceeded to present this appeal in an adequate manner, even though the Court finds no error in the decision or procedures of the Bankruptcy Court.

Throughout the appeal the Penn's have sought to derail the foreclosure proceedings in Parke County. Our Court of Appeals has acknowledged the importance of state foreclosure proceedings being given due respect even while bankruptcy proceedings are pending. In re Tynan, 773F.2d 177,178 (7th Cir. 1985). To have stayed such foreclosure action here --although this second foreclosure action commenced in 1985 and did not conclude until February 17, 1989--would have impermissibly given the Penn's a right which state law does not create. Therefore, there requests for a stay of the foreclosure action was properly

denied, dispite the hardship which facing a foreclosure has caused. This Court finds no denial of due process or any other substantive or procedural right applicable to this proceeding, either before the Bankruptcy Court or on Appeal. Finially, while challenges to the integrity of the judicial process of the Bankruptcy Court must be examined closely, where such challenges grow from the bitterness of defeat and lack even one whit of support in the record, they will not be permitted to further entangle or prolong a meritless appeal.

The Court now finds, therefore, that the Bankruptcy Court's findings of fact were not clearly erroneous but instead were fully supported by the record, the Bankruptcy Court correctly applied the law to the facts, the Penn's dissatisfaction with the preformance of their attorney in the proceedings before the Bankruptcy Court does not provide a basis for relief on appeal and there is absolutely no support for the conclusory claims of impropriety by the Bankruptcy Judge or the

attorneys in this action. In sum, the Bankruptcy Court's disposition of the Penn's objection to the Bank's claim was proper and is now therefore AFFIRMED.

IT IS SO ORDERED this 29th day of September, 1989.

Sarah Evans Barker, Judge
United States District Court

ADVERSARY PROCEEDING No. 87-0481

UNITED STATES BANKRUPTCY COURT
Southern District of Indiana
Indianapolis Division
Bankruptcy Case #IP87-7652RAJ

Robert E. Penn, and Patsy S. Penn debtor/plaintiff	)	Filed
v.	)	March 4, 1988
The Parke State Bank defendant	)	

Before: Frank J. Otte
Bankruptcy Judge

ORDER ON OBJECTION TO CLAIM

The debtor's objection to the claim of the Parke State Bank came before the Court for hearing on March 4, 1988. At the close of the hearing, the Court entered it's findings and conclusions, the Court now ORDERS as follows:

1) The objections to the claim filed by the Parke State Bank are SUSTAINED IN PART and DENIED IN PART.

2) The Parke State Bank has a secured claim in this action in the amount of $70,845.93 less a set-off of $2,500.00, for a net secured claim of $68,345.93.

ADVERSARY PROCEEDING #87-0481

UNITED STATES BANKRUPTCY COURT
Southern District of Indiana
Indianapolis Division
Bankruptcy Case # IP87-7652RAJ

Robert E. Penn, and	
Patsy S. Penn	FINDINGS
DEBTOR	TRANSCRIPT OF TRIAL
V	Adversary proceeding
The Parke State Bank	#87-0481
CREDITOR	March 4, 1988

Judge Frank J. Otte, Presiding

(Transcript pages 93-108)

FINDINGS

(TRANSCRIPT OF TRIAL)

(p.93)

The Court: Please be seated. All right. Let's go back on the record in this matter, Penn. Again this cause number is IP87-7652. The Court has reviewed all of the--- all of the documents. I've reviewed my notes, and I'm ready to enter an order--ready to put my

findings on the record. However, before I do that, I have a question concerning a (p.94) matter that was touched on, and it has to do with the per deim interest. It was set at $14.90.3 per day on the amount of the mortgage outstanding. And yet there was an adequate protection order, and the testimony was that the Penn's were paying, and I take it current, on their payments. Is that Correct? And who can help me with that?

MR. HANNER: Mr. Bosley can. They're applying the----

MR. BOSLEY: We are applying their adequate protection payments as normal monthly payments, taking thirty days interest and applying the rest to principal.

THE COURT: All right. Now, well, how many-- I guess let me ask it this way then. How many days apply to the $14.90?

MR. BOSLEY: Well, there's still considerable past due interest on the loan. Whenever the adequate protection

payments started coming in, we weren't sure as how to apply them, so we applied them as normal monthly payments at the time. Those payments could have realistically have been applied to the past due interest to bring it current first. Now as far as the breakdown we don't have that with us.

THE COURT: Well, I have a total of 463 days from the time that the claim was filed which was on the 23rd of December '86. But--excuse me, folks. If these folks are paying on it, I cannot believe that the $14.90 should run for each and every day.

MR. HANNER: (p.95) You're probably correct.

MR. MILLER: What we--excuse me, I'm sorry.

THE COURT: Sure, That's all right.

MR.MILLER: It seems like what we need to know is exactly when the adequate protection payments began because they would be paying their interest on a current basis as of the adequate protection payments.

THE COURT: That would be my belief.

MR. HANNER: And then the interest would only run on the deliquency?

MR. MILLER: Well, the interest, I would think the per deim interest would only run from the time that you filed a claim up until the time you got the first adequate protection payment and started paying interest from there.

MR. HILE: Your Honor: I just checked with Mr. Bosley, and he indicated that he believes the adequate protection order was entered January '86. The interest figure calculated there does not include an additional interest charge on the arrearage amount which is about $9,000. It would still be the interest running on that balance at the rate in the note. In other words, their current mortgage--their current payments which are keeping current with the mortgage don't take care

of the (p.96)interest accruing on that arrearage amount.

THE COURT: Well, the arrearage amount--the adequate protection payment would have come in within a very small period of time after the claim was filed. Well, I know, it would have come in nine months before--or a year before.

MR. HILE: In January '86, is the correct date, which is the best of his recollection, the adequate protection would have calculated from that date. What I am saying is that our knowledge that the claim had the figure of post-petition interest, that it is calculated to the point of the adequate protection payment being entered. Is that-okay. So they did not continue to accrue post petition interest. How do I say this? The claim was entered in November--the claim was filed November'86. It however--the

figure that it uses ceased interest calculation as of January '86 when the adequate protection payment was entered, okay?

THE COURT: Okay.

MR. HILE: It was filed subsequent, but the figures are only as of January '86. It's the Bank's position, however, that they are entitled to the continued interest on the arrearage amount. The continued payments keep tract--keep the actual note itself from--the whole thing from accruing interest, but that $9000 in which they (p97) were in arrears-

THE COURT: Well, that was--The $9,000 wouldn't be $14.00 per day. No way it could be that.

MR. HANNER: No sir. It would not.

MR. HILE: No. That rate--right. And that rate could be misconstrued that the rate in the note which was---

THE COURT: Nine and a half percent, wasn't it?

MR. HILE: --nine and a half percent.

THE COURT: In the note from the Exhibits it was nine and a half percent. So it would be nine and a half percent then? Mr. Miller, you're a banker. Are we in agreement on that?

MR. MILLER: What I'm--I guess what I'm feeling here is that the arrearage does not constitute an additional sum capable of accruing interest. The principal accrues interest, and the principal has an interest calculation up to the date of the claim, if I'm not mistaken. The arrearage is something--nothing more than a bookkeeping entry of arrearage. There's no reason why --because they were late with these payments, these payments accrue interest on the principal and then accrue interest again because that part of the principal is past due. I don't think I can agree to that.

TTHE COURT: Well I--let me conclude it this way. If we use that interest rate on that $9,900.00 with all that we're dealing with here, we're dealing with a nominal figure. (p98) And I'm going to take that part out of my entry. All right. Now I'm going to go through here and put my findings on the record. And I want to do this in a very deliberate fashion. And when I do this, sometimes I get a little bit nervous, and I have a tendancy to talk a little fast, and I want to prevent myself from doing that today. And I do that because I know that this practice is not something that's done by all the Judges, and I guess in a way I want to get it over with, but at the same time--

(Power Failure-Machine Goes Off)

THE COURT: Please be seated. Now we're going

to start again. I have here a small tape recorder that I used the other night over at IUPUI when I gave a speech, and Marie transcribed it for me. It had excellant fidelity, and I'm going to turn it on. It's now running. You can see the red light. In the event the lights go off or the power goes off, I'd like to just be able to continue . And this will be our record. And if anybody needs a copy of it or would like to listen to it, fine. It's available. And we'll either play it into the permanent record here or we'll transcribe it for you. Okay. Now, first of all, the stipulations that were submitted here by the parties, and those items listed on there and then signed by the parties, will become part of the findings in this matter. And they're so made a part of the findings in the record. We have a --the objections to the claim having (p99) been filed here on March the 18th of 1987, in that objection there are four different counts. I'll deal with each one as we go through the issues raised. But first I want to say that as to Counts one and two, on the

matter of the--on the matter of the truth in lending allegations, I'm going to deal with those last. Taking Count Three as set out here, the isue being, did the Defendant's actions in reallocating a previously settled payment violate the implied covenants of good faith and fair dealing? The Court finds that there was no evidence on that presented by either party and that therefore I must rule for the Defendant and find that there was no violation of implied covenant of good faith and fair dealing. Now that brings me--reminds me of another matter that I haven't dealt with, and I must. And that is this question of amending the complaint to include a --the addition of--let me get it characterized here as- this is to allow the addition of a covenant of fair dealing and good faith that was an amendment that was offered by the Plaintiffs this week right before trial. I had said I would rule on it at a later date, and I'm going to rule on that now. And that was an amendment to add the words , breach of implied covenant of good faith and fair dealing to

rhetorical paragraph 16, just after the words, malicious prosecution. That amendment--or that motion for that amendment is over-ruled. Now, as to Count Three, are punative damages affordable to the Plaintiff (pl00) because of Defendant's actions in reallocating the previously settled payment? It is true we're dealing with a contract action that is the basis of a note. It is true that we're dealing with a contract action which has a basis of a mortgage. And I find that there is absolutely insufficient evidence to award any punative damages on that Count and so find for the Defendant, the Parke State Bank. Now as to Count Four, was the Defendant's initiation of a foreclosure action or proceeding on December the 20th of 1983 without probable cause? The history of the payment of this loan from the beginning in 1976 is a history of very erratic payments. In reviewing the documentary evidence submitted, I found that the late charge of $11.00 and some odd cents were paid almost as often as the--as the interest payment and the principal payment. And I believe

that the Bank had every cause it needed to file that foreclosure action in December of '83 on a loan that was admittedly, by all parties, deliquent at that time. On Count Four, did the Defendant's initiation of foreclosure proceedings breach a previously established course of dealing with the Plaintiffs without prior notice? Now it is true that for--the Bank did accept late payments, but there is a point in time where enough is enough. And the loan was behind at the time that foreclosure action was filed. The documents call for acceleration. Foreclosure is the proper procedure to accelerate and to foreclose on the mortgage. (p101) And I think the evidence is clear the Bank certainly was within it's rights to do so. And I do not believe that it violated any prior established course of dealing with the Plaintiffs. As to Count Four, did Defendant's initiation of foreclosure proceedings breach a previous verbal agreement? The Court finds that it did not. In addition to the fact that there were many dealings where and what I perceived to

be a small town Bank attempting to accomodate, we have real estate and I don't believe that any verbal agreement was established by the evidence. We do have some conversation about what may have been said by whom, when. It's a controversy, but my findings is based on the evidence presented to me, and having had the opportunity to observe the witnesses and their--all that goes with that, that was not a violation, and I find for the Defendant, Parke Bank. Now was the Defendant's initiation of a foreclosure proceeding motivated by malice toward the Plaintiffs? And I find no evidence of that. In fact, I find it interesting that the --this Mankin problem, this second note having to do with the personal injury, was really something that came up as an accomodation while the other problem was going on, and we may have had some evidence of frustration. We may have had some evidence of just even anger, I believe is what was described to, but out world is not to pristine and pure that people can't get upset over things that don't go right, where we have to

translate that (p102)into malice and punative damages. I think the evidence is clear on that there was no malice, and I therefore find for the Defendant, Parke Bank. And did the Defendant's initiation of foreclosure proceedings breach the imlied covenant of good faith and fair dealing? And I dealt with that on amendment. The answer to that is, no, it did not, and I find for the Defendant, Parke State Bank on that Count and issue. And did the Defendant's initiation of foreclosure proceedings cause injuries to the Plaintiffs' personal and business dealings? Now, we have in the record here income tax returns, Schedule C's and testimony from Ms Swaim that things just got better from 1982 forward. We have no evidence whatsoever of an attempt to get a bond either before or after the Bank did anything. And in fact, the expert witness for the Plaintiff in this case testified that she based all her bond problems on the second foreclosure that was filed in 1985 and still pending, while the pleadings clearly tried

to tie this business problem in with the 1983 foreclosure. The--I believe it was 1983, if I recall the Exhibits, that the Plaintiffs lost some $1,700.00 in the construction business and now we're told by their expert that the Plaintiff, Mr. Penn's income is going to be over 31,000 here in 1987. I think that what we have had here is--besides with the bond that any bonding company would have found that these folks were in default and had a history of (pl03) default on that mortgage, or deliquency prior to the foreclosure and that there just wasn't anything that this Bank did that aggravated, caused , or in any way, in my judgement, affected their business dealings or caused any injury to them. Now let me let me say that I find the amount of the claim here that is going to be allowed with certain deductions to be as follows. The claim was filed back in December of 1986 in the amount of $67,345.93. And we've already had some discussion here on the record concerning the interest on some $9,900.00, and the Court will not add any interest to that. However,

we did have testimony as to attorney fees, that being 52 hours, and the Court knowing when we started and knowing what time it is now, is going to add four hours to that, at $60.00 an hour, is $3,360.00. And I think in fairness to everybody I've got to consider the fact that Mr. Hile was here, and I'm going to make the attorney fees $3500.00 for a total amount of $70,845.93. The thing I had to wrestle with in this case is the truth in lending section in Counts One and Two. And I knew that I was going to have to wrestle with it after I got into this and read the briefs. And I wrestled with it, and we took a look at the statute. I've got a very able law clerk, as you all-well know, and we came up with an answer. I'm going to put that on the record. And these are my findings to that much to my dismay. As to the allegations that the Bank violated the truth in lending and the Uniform Commercial Code (p104) as enacted in Indiana, the Bank has stipulated that such violations occurred and so characterize those violations as technical violations. And the only defense

raised by the Bank in response to those violations is the bona fide error defense that's codified in 15 U.S.C. Section 1640 subparagrah C. Now, if the Bank could show that the errors were bona fife, then the Bank would be exempt from liability. However, in order to prevail on this bona fide error defense, the Bank would have to show that the errors occurred despite the fact the Bank was making a good faith effort to comply with the truth in lending act. And I'm not so sure that didn't happen. However,we really don't have anything on that. And the case that I'm going to cite here is Ameribal versus General Motors Acceptance Corporation, and the citation is 537 Fed 2d 871. That's a Seventh Circuit Case of 1967. Now, in this case the Bank is only shown that it has changed it's practice since the transactions were consummated. The Bank has not established that it had quidelines and procedures in place in late 1967 which were designed to ensure compliance with the truth in lending act known as the TILA and the UCCC. There-

fore, the improper disclosures were not the result of a bona fide error, and the Bank can not escape liability for them. Now, the Penns have completely and totally failed to show any damages resulting to them because of the improper disclosures. I just find it absolutely amazing that somebody (pl05) can come in years later and say, all bets are off, I didn't have my three days notice to recind. Here it's the third loan on a house that's being completed for materialmen, but be that as it may, often times the Court finds things in the law that must be followed somewhat surprisingly, and this is one of them. However, accordingly, I think that the Penns, because there was a violation, are entitled at most to $1000.00 damages pursuant to 15 U.S.C. section 1540, subparagraph A(2)(a). plus costs and reasonable attorney fees pursuant to section 1640A(3). And in addition to an award under truth in lending act, the Penn's may also recover for violation under UCCC. Violation of the truth in lending is a violation of the UCCC. So therefore, the Bank unfortun-

ately had violated both. And Indiana Code 24-45-5-203 provides the same damages that would be available under the truth in lending, known as TILA. There is no more than $1000 for this particular transaction because again, I think that the Penns have failed to establish any other damages. And when these are characterized as technical damages, they certainly are technical and they're somewhat insignificant, but the law must be followed. Indiana case law allows the Penns to recover the statutory damages for both the truth in lending and the UCCC violations, and that can be found in Corbin versus Town Finance, Inc. at 417 Northeast 2d, 1172, Indiana Appellate 1981. And therefore, although the Court (pl06) finds the improper disclosures to be quite minor and the fact that such violations can be subject to a Federal lawsuit positively ludicrous, the Court is required by law to award the Penns a set-off of $2000.00 against the claim of the Bank. And the case I'm referring to on that is Chapman, 33 Bankruptcy

Bankruptcy 784. And that's in the District of Rhode Island, 1983. The Penns are also entitled to set-off reasonable attorney fees. The Penns are not entitled to recover for Mr. Miller's fees charged in connection with any other issue in this case, other than the truth in lending and the UCCC issues because the Penns do not prevail on any of those issues. And the Court has reviewed the file and the brief submitted by Mr. Miller, and further the Court knows that Mr. Miller has appeared in this Court as in-house council for a local financial institution and is undoubtedly well-versed in the truth in lending act and the UCCC issues, and the Court believes a fair and equitable award for the time expended by Mr. Miller on the truth in lending issue and the UCCC issue given the fact that the Bank has stipulated the violations is $500.00. Now, the Penns are also entitled to costs of this action, and they've presented no evidence as to these costs. And the Court recognizes that a normal procedure in this case having been filed that the Penns would have paid

$120.00 to file the adversary proceeding. However, in as much as the truth in lending is only a small part of this adversary proceeding (p107)in the absence of the other evidence of costs, the Court declines to award costs to the Penns. So, in conclusion, the Penn's may off-set the claim of the Bank by $2,500.00. Now the--so therefore, the objection of the Penns to the claim of the Parke State Bank are sustained in part and over-ruled in part, as I have indicated, and that the Parke State Bank would have a claim then against the Penn's subject to the $2,500.00 set-off in the amount of $70,845.93. Now, the Court will reschedule a hearing on confirmation and the objection of the Parke State Bank to the plan filed by the Penns at a later time. I might point out that in reviewing this and not only the pleadings but hearing the witnesses and observing their demeaner, all of which the Court has based it's judgement on, that we have a relationship of a Bank and folks start back now some 12 years

years ago, I find the Bank was tolerant and understanding and probably as I characterized earlier, a small town Bank trying to help people that they knew, and we get these pleadings with these punative damages in them. And this is a case that I just don't think they're necessary at all. We have a mind-set in this country of legal lottery. This Court's not going to play that. If you want to hit the lottery, you buy your ticket in Illinois. But we know full-well on contract actions that it takes an awful lot in this State to prove up punative damages. Nothing in this case even came close (p108) to that. And I would just say that as lawyers, gentlemen, you have a duty to be councellors first, peacemakers in these matters, not to bring client's hopes up to hitting the jackpot. Anyway, that's my ruling. The Matter's concluded.

(Case Concluded)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated 3/23/88 By: Mayzie M. Morelli

No. 85-C-13

PARKE CIRCUIT COURT
Rockville, Indiana

The Parke State Bank PLAINTIFF v Robert E. Penn, and Patsy S. Penn DEFENDANTS	)	Filed February 17, 1989

Before: Charles K. McCrory
Special Judge

FINDINGS AND JUDGEMENT

Comes now the Plaintiff by James R. Bosley and by council, and comes now the Defendants in person and without council. This matter having been set for trial before this court this date, evidence is heard, and the Court now enters the following findings and judgement.

FINDINGS

1) The Plaintiff, the Parke State Bank is a banking corporation organized and existing under the State banking laws with it's principal place of business in the town of Rockville,

Indiana.

2) On December 29, 1976, the defendants Robert E. Penn and Patsy S. Penn by their joint and several promissory note, a copy of which was attached to the plaintiff's complaint herein and marked as Exhibit "A", promised to pay plaintiff the sums shown therein, with interest shown therein, in installments shown therein.

3) On December 29, 1976, the defendants, Robert E. and Patsy S. Penn were the owners of the following described real estate, located in Parke County,Indiana to wit:

> A part of the Northwest Fractional Section 4, Township 15 North, Range 8 West and more particularly described as follows,viz: Commencing at the half mile stake on West side of section 4,Township and Range aforesaid, running thence twenty (20)rods, more or less to a corner: Thence North twelve (12) rods, more or less to North side of Highway #36, for a place of beginning, thence running East along North side of Highway #36 a distance of 208.7feet, more or less thence North417.4 feet more or less to the East lineof a track of land belonging to Mark Smith and Edith Smith, said deed being dated January 14, 1956, and recorded on this date in Deed Record No. 122, page 15; thence following the East line of said track 417.4 feet, more or less

to said Highway #36 and the place of beginning, continuing in said tract, two (2) acres more or less.
ALSO A PART OF THE Northwest Fractional Section 4, Township 15 North Range 8 Westand more particularly described as follows, viz: Commencing at the half mile stake on West side of Section 4, Township and Range aforesaid, running thence East twenty (20) rods, more or less to a corner, thence North twelve (12) rods more or less to North side of Highway #36 running thence East along North side of Highway #36 a distance of 208.7 feet, more or less, for a place of beginning, said point beginning the Southside corner of tract conveyed to Robert Penn and Patsy Penn on May 22, 1968 and recorded in Deed No. 134, page 382 in the office of the Recorder of Parke County, Indiana, running thence North along the East line of the above-mentioned tract 417.4 feet, more or less, running thence East 208.7 feet more or less; thence running South 417.4 feet more or less to said Highway #36, running * West along said Highway 208.7 feet, more or less, to the place of beginning, containing two acres more or less.

4) To secure the payment of a promissory note of said date as well as all renewals and extensions thereof, the defendants executed to plaintiff a real estate mortgage covering said real estate, a copy of which real estate mortgage was attached to plaintiff's complaint herein, and marked "Exhibit B".

5) Said real estate mortgage was duly recorded on December 30, 1976 in Mortgage Record Volume 122, page 520 in the office of the Parke County Recorder.

6) That the defendants Robert E. Penn and Patsy S. Penn have failed and refused to pay the indebtedness represented by said promissory note when due, and said promissory note and mortgage provide that in the event of default of the payment of the indebtedness when due, that the entire principal sum together with all accrued interest shall at once become due and payable, without notice, at the option of the holder of the promissory note, and by virtue of said provisions, the plaintiff the Parke State Bank has elected to exercise it's option and has declared the entire indebtedness secured by said note and mortgage due and payable.

7) That the defendant's have previously dismissed their Chapter 11 Bankruptcy proceeding which was pending in the Southern District.

8) That there is now due and unpaid to the

plaintiff on the principal amount of indebtedness the sum of $51,197.80, interest in the sum of $12,048.37, late fees in the sum of $364.56, and insurance paid in order to secure the Bank's interest in the real estate in the sum of $900.00.

9) That the note and mortgage that are subject of this action provide that the plaintiff the Parke State Bank is entitled to reasonable attorney fees in the foreclosing of said mortgage, and a reasonable attorney fee as shown by the evidence herein in this matter is $15,298.79.

10) That the plaintiff the Parke State Bank has acknowledged by it's contentions and pretrial brief that there were technical violations of certain provisions of the UCCC regarding the right of recission and disclosure statements and therefore the defendants are entitled to a set-off on their counterclaim against the amounts owed the plaintiff in the sum of $2,500.00.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the within described real estate and all the right, title, interest, and claim of all of the defendants and any and all persons claiming from, by and through them, in and to said described real estate or so much thereof as may be necessary for the purpose, shall be sold by the Sheriff of Parke County, State of Indiana as all other lands are sold in accordance with the actions of the General Assembly of the State of Indiana, as to sales on foreclosure, said sale to be made without relief whatsoever from valuation or appraisement laws to satisfy the judgement herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff the Parke State Bank shall have judgement against the defendants Robert E. Penn and Patsy S. Penn on their promissory note dated December 29, 1976 together with advancements and attorney fees in the sum of $79,809.52 less $2,500.00 representing a set-off on defendants counterclaim, for a judgement of $77,309.52 plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the proceeds arising out of the sale of the real estate and fixtures hereinbefore described are to be applied as follows

1) For the payment of costs and accruing costs herein;

2) To the payment of the judgement herein rendered in favor of the plaintiff the Parke State Bank, the said judgement to bear interest from February 9, 1989 at the rate of 10% per annum;

3) The overplus, if there be any, to be paid by the Sheriff to the Clerk of this Court for the use of the parties entitled and authorized to receive the same.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, in the event said mortgaged premises shall fail to sell for the sums sufficient to pay and satisfy the judgement rendered herein, together with interest, costs, and accruing costs, that the residue thereof remaining unpaid shall be levied out of the goods, chattels, lands and tenaments of said defendants Robert E. Penn and Patsy S. Penn

subject to execution; and that any sell thereof shall be made without relief whatsoever from valuation or appraisement laws.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that a duly certified copy of this judgement and decree under the hand of the Clerk and the seal of this Court shall be sufficient authority for the Sheriff to execute the same.

Charles K. McCrory
Special Judge
Parke Circuit Court

Dated this 17th day of February, 1989

No. 85-C-13

PARKE CIRCUIT COURT
COUNTY OF PARKE
Rockville, Indiana

Parke State Bank PLAINTIFF v Robert E. Penn, and Patsy S. Penn DEFENDANTS	February 9, 1989 TRANSCRIPT of EVIDENCE

TRANSCRIPT OF EVIDENCE

BEFORE: Charles K. McCrory
Special Judge

APPEARANCES

For the Plaintiff, Parke State Bank:

James O. Hanner

For the Defendants: Robert E. Penn, and

Patsy S. Penn

Defendants Appeared in Person, Pro se

(Record pages 197-207*

*Indiana Appellate Court Case #61A01-8903-CV81
Appeal from the Parke Circuit Court)

THE DEFENDANTS , TO MAINTAIN THE ISSUES ON IT'S BEHALF, OFFERED AND INTRODUCED THE FOLLOWING EVIDENCE TO WIT:

MRS. PENN: Your Honor, the defendant's would like to address the contentions of the Parke State Bank as follows to this Court and would appreciate no interruptions until finished.

COURT: Well we won't guarantee that Mrs. Penn.

MRS. PENN: The Parke State Bank has interstate (i.e.entered state) Court proceedings fully intending the usage of a Bankruptcy Court Order dated March 4, 1988 as a tool to defraud the Penns of their property. The Penns have since made every effort to acquaint this Court with the irregularity and the illegality of this state court situation.

MR. HANNER: All right. Stop right there.

Your Honor, I don't want to interrupt her as she goes on to each and every stage, but I object to the reading of this statement into the record whatsoever. It doesn't appear at this time that it goes to any of the matters before this Court as based upon the answer and the counterclaim as filed by her previous council and which are of record. Those matters go only to the matter of a set-off and reapplication of a payment back of which the attorneys were asking credit for against this account. So I would object.

COURT: Well Mrs. Penn, I can tell you at the out-set here, we are not going to try the Bankruptcy case.

MRS. PENN: Okay, can I make one other statement?

COURT: All right.

MRS. PENN: Okay, I have shown this Court Civil Code of 1881 in prior hearings, 34-1-53-7 "When Foreclosure Unavailable, the Plaintiff shall not proceed to foreclose his mortgage while he is prosecuting any

other action for the same debt or matter which is secured by the mortgage or while he is seeking to obtain execution of any judgement in any other action".

MR. HANNER: Your Honor: This is a closing statement. And I don't believe it should be evidence in this cause.

MR. PENN: Your Honor: I am requesting the Laws be the evidence in this State ...in this Court.

COURT: The law is applied, it is never evidence. I'm sorry Mrs. Penn, I indicated to you at pre-trial conference that uh..

MRS. PENN: I am requesting these Laws to be applied in this case, okay?

COURT: All right, then that is a closing statement as Mr. Hanner said and not appropriate at this time.

MRS. PENN: I feel this Court is very aware that the Penns can not obtain equal access to justice in this Court Room. Our disputes are sub-

ject matter of a pending appeal in the United States District Court and I really feel...

COURT: Mrs. Penn...

MRS. PENN:..that this Court...

COURT: Mrs. Penn. You have just said that you can not get justice in this Court Room. I have indicated to you at pre-trial conference that you were entitled to a lawyer and you should employ one, but if you did not have a lawyer in this Court Room, you most certainly would be bound by the same rules. Now any lawyer that comes before this Court and I happen to be sitting as the Court at this time and say, they cannot get a fair trial is prenouncing a pretty heavy statement on the Court. No person including this Judge aims to be called crooked, deceiving, fraudulent or placed in a position by your statement that justice can not be rendered here. Now if you have a particular reason why this Court is not able to render justice to you

whether you win or lose, I want to know it now.

MRS. PENN: Okay, does this Court have jurisdiction to uproot or change a Bankruptcy Court's ruling?

COURT: The ruling of this Court on that question is yes.

MRS. PENN: You do have jurisdiction to change a Bankruptcy Court ruling?

COURT: Yes, ma'am. I told you at pre-trial conference that the Court, State Court can act simultaneously with the Federal Court on any particular issue such as this.

MRS. PENN: Your Honor, what you stated to Bob and I in the pre-trial hearing, was the fact that the only subject matters in this Parke Circuit Court was not any of our disputes, but was did we borrow this money and have we paid back this money.

COURT: All right. I remember making that statement. I said one, whether you executed the mortgage; whether you executed a note, whether you received

the money and whether you paid it back on a timely basis pursuant to your contract.

MRS. PENN: That is the issue in this Court?

COURT: That's correct.

MRS. PENN: That is the issue in this Court but...

COURT: That's what we're going to rule on.

MRS. PENN: ...the Penn's complaints of the Parke State Bank's actions cannot be heard in this Court, is that not correct?

COURT: That what?

MRS. PENN: The Penns disputes against..the the allegations of the repeated violations of the uniform consumer credit code laws.

COURT: Only as they would act to set off.

MRS. PENN: They would act to set off but they are also subject matter of a prior pending appeal that you stated in pre-trial hearing, could not be heard.

COURT: I have no evidence of a prior pending appeal. For example, I have no evi-

dence....

MRS. PENN: Your Honor, I just put it before you.

COURT: All right. You placed a letter before me and I assume that it is correct.

MRS. PRNN: If you will look at the docket sheet...

COURT: You also testified that you dismissed the bankruptcy in which this claim was filed...

MRS. PENN: The subject matter...that's where it was filed, yes. But the subject matter of the order dated from that day is subject matter of appeal pending in the District Court, the appropriate Court of jurisdiction pursuant to 28 U.S.C.

COURT: Well, you're talking Bankruptcy Court, that's Federal Court and as I indicated I don't know the real status of that. Mr. Hanner, maybe you can tell me what the status of the bankruptcy is.

MRS. PENN: Your Honor, the status is right

before you in a docket sheet from the District Court dated as of yesterday. You have a letter there from the Deputy Clerk stating that it is pending.

COURT: Well, I see something pending here. I have no idea what they are talking about and as I indicated we have concurrent jurisdiction in this type of case.

MRS. PENN: Your Honor, I am not going to get into this with this Court. This Court is fully aware this is a fraudulent State Court proceeding intended to defraud the Penn's of our property. It is our feelings that this Court is intentionally interfering with due process of law.

COURT: You may hold that opinion, Mrs. Penn.

MRS. PENN: I will.

COURT: Then you may proceed with your evidence.

MRS. PENN: I have no further evidence. You told us in the State Court pre-

ial hearing, that our only subject matters in this State Court Room were, if we did this, did we execute this...

COURT: And if you didn't do those things the mortgage would be foreclosed, would it not?

MRS. PENN: Excuse me?

COURT: And I also indicated that if you didn't pay according to the note and the mortgage and the payment plan, that the mortgage would be foreclosed accordingly.

MRS. PENN: Your Honor...

COURT: Which would include attorney fees plus interest. And thats been the subject matter that I told you that we would be hearing. Then if you have a defense to that, most certainly by payment you would be given credit for that.

MRS. PENN: I have no further things to state to this Court. Every action in this Court is appealable.

COURT: You bet. Are you resting then Mrs.

Penn?

MRS. PENN: I am, yes.

COURT: All right, do you have any further evidence, Mr. Hanner?

MR. HANNER: No sir. No rebuttal.

COURT: All right. This Court will take it under advisement.

AND THAT WAS ALL THE EVIDENCE GIVEN IN SAID CAUSE.

****

REPORTER'S CERTIFICATE

I, Sue Berry, Official Reporter of the Parke Circuit Court do hereby certify that the foregoing transcript is a true, full, complete and correct transcript of all the proceedings held before the Honorable Charles K. McCrory, Special Judge, at the trial of the above entitled cause, including objections, the ruling of the Court in respect to the admission and the rejection of evidence and documentary evidence, and that the same is the origional transcript of the evidence as recorded by me.

WITNESS MY HAND, this 19th day of May.

Sue Berry, Reporter
PARKE CIRCUIT COURT
PARKE COUNTY, INDIANA

No. 61A01-8903-CV00081

THE INDIANA COURT OF APPEALS
STATE HOUSE
INDIANAPOLIS, INDIANA

Robert E. Penn, and Patsy S. Penn	)	Filed
Defendant/Appellant	)	June 18, 1990
v	)	
The Parke State Bank	)	NOT FOR PUBLICATION
Plaintiff/Appellee	)	

Before: Robertson, J.

Sullivan, J.

MEMORANDUM DECISION

Statement of the Case

Defendant-appellants, Robert E. Penn and Patsy S. Penn (the Penns), appeal from a judgement in favor of plaintiff-appellee, the Parke State Bank (Bank), in it's mortgage foreclosure action against the Penns. We affirm.

FACTS

On December 29, 1976, the Penns executed the Penns executed a note in favor of the Bank for $62,000.00 and pledged certain real estate as security. Based on the Penns failure to

pay amounts due under the terms of the note and mortgage, the Bank instituted a mortgage foreclosure action in the Parke Circuit Court. After conducting a bench trial and entering it's findings, the trial court entered it's judgement in favor of the Bank and ordered the real estate sold to satisfy the judgement.

DISCUSSION AND DECISION

Initially, we note that the Bank requests the Court to Dismiss the Penns appeal claiming they provided an insufficient record and prepared an inadequate brief. Although the Penns brief is conclusory and is lacking in citations to the record and pertinent authority, we are able to concern some of the errors they claim. Accordingly, we will dispose of this appeal on the merits.

The Penns first claim the trial court erred in exercising jurisdiction to decide the foreclosure action while there was an adversary proceeding pending appeal in the United States District Court for the Southern District of Indiana. The Penns base their argument on IND Code 34-1-53-7 entitled "mutually

exclusive actions". That statute provides:

> The plaintiff shall not proceed to foreclose his mortgage while he is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he is seeking to obtain execution of any judgement ment in such other action; nor shall he prosecute any other action for the same matter, while he is foreclosing his mortgage or prosecuting a judgement of foreclosure.

We disagree with the Penns that IND Code 34-1-53-7 applies to the facts of the present case.

> The adversary proceeding apparently arose out of the Penns voluntary petition for Bankruptcy filed under Chapter 11 of the United States Bankruptcyt Code. While the Penns voluntarily dismissed their Bankruptcy petition, the adversary proceeding was still alive. The Bankruptcy Court ruled on the Adversary Proceeding and the Penns appealed to the District Court. The Adversary Proceeding was based on the Penns challenge to the Bank's proof of claim filed in the Bankruptcy proceedings. On appeal the District Court upheld the Bankruptcy Court's decision. The District Court further found the Penns complaints of inadequate representation of council in the Bankruptcy proceedings, irregularity and illegality in the proceedings, and collusion and fraud among the Bank, attorneys and judges to be totally unfounded.

The Bank, by filing it's proof of claim in the bankruptcy court, was merely seeking to estab-

lish it's claim as a secured creditor in the Bankruptcy proceedings. Such action does not amount to "prosecuting" the bankruptcy action. Accordingly, it was entitled to pursue it's foreclosure action in state court. The trial court properly exercised it's jurisdiction to decide the Bank's foreclosure action dispite the pending appeaal of the adversary proceeding in Federal court.

The Penns further assert the trial court erred in enforcing a contract against public policy. Apparently, the Penns argue that the note and mortgage were against public policy because they contained an acceleration provision in the event of default which resulted in the Penns being wrongly deprived of their property. The Penns argument is without merit because of this court's decision in Streets v M.G.I.C. Mortgage Corp. (1978), 177 Ind. App. 184,188, 138 N.E.2d 915, where we held that:

> "A provision in a mortgage or note which allows acceleration of the entire debt upon a default or breach of the term or mortgage or note does not in itself constitute a penalty or forfeiture and does not violate public policy. Such a provision is enforceable both in this state...and

as a general rule".

Finially, the Penns advance serious allegations of fraud, collusion, misrepresentation and violations of their Constitutional Rights by the Bank, attorneys and judges involved in this case. These issues may be res judicata due to the District Court's decision on similiar issues raised by the Penns in their appeal of the Bankruptcy proceedings. Nonetheless, we can find nothing in the record and the Penns fail to provide us with citations to the record in support of their assertations. Accordingly, we find the Penns allegations to be without merit.

The Bank requests that this Court award attorney fees the Bank occurred in defending this appeal. Both the mortgage and the note provide that in the event of default, the borrower is responsible for attorney fees. This Court has recently recognized that .."a contractual agreement for a payment of attorney fees includes payment of appellate fees." Seibert v Mock (1987), Ind. App., 510 N.E. 2d 1373. Accordingly, the Bank is entitled to a

remand to the Trial Court for a determination of reasonable appellate attorney fees.

The Trial Court's judgement is AFFIRMED and the cause REMANDED for a hearing to determine reasonable appellate attorney fees.

Robertson, J., and
Sullivan, J. CONCUR

No. 61A01-8903-CV-00081

The INDIANA SUPREME COURT
State House
Indianapolis, Indiana

Robert E. Penn, and Patsy S. Penn	)	
	)	Filed
Appellant	)	
	)	October 18, 1990
v	)	
	)	
The Parke State Bank	)	
	)	
Appellee	)	
	)	
	)	
Lower Cause: 85-C-13	)	

Before: Randall T. Shepard, Chief Justice

You are hereby notified that the SUPREME COURT has on this day, 10/18/90, :

APPELLANT'S PETITION TO TRANSFER THE ABOVE STATED CAUSE TO THE SUPREME COURT TO REVIEW is hereby DENIED.

Randall T. Shepard,

Chief Justice

ALL JUSTICES CONCUR

Witness my name and the seal of said Court this 18th day of October, 1990.

Dan Heiser, Clerk
Indiana Supreme Court
Court of Appeals, and
Tax Court

ADVERSARY PROCEEDING NO. 87-0043

Case #85-02101 TH RA

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

Robert E. Penn, and	)	
	)	
Patsy S. Penn	)	Filed
	)	
Debtor/Plaintiff	)	December 15. 1987
	)	
v	)	
	)	
The Parke State Bank	)	
	)	
Defendant	)	

Before: Honorable Michael H. Kearns

Bankruptcy Judge

ORDER OF RECUSAL

This matter was duly noticed and scheduled for trial September 30, 1987 at 4:30 p.m. in the Terre Haute Division along with numerous adversary trials scheduled that day. Each of the party litigants and their respective attorneys appeared before the appointed time. Due to the congestion of the Court's docket that day and the unexpected length of time in litigating adversary matters scheduled prior to the instant case, this case was not called

on for trial at 4:30 p.m., but council were informed that their case would be called accordingly to the chronological schedule during the daily, evening, or even night session that day.

As a result of the congestion of the Court's docket, the case had not been called by 7:30 p.m. on the scheduled date. The parties and council as a consequence had a 3½ hour wait during which the parties entered into negotiations. These negotiations were by and between council consulting with their clients during different intervals. No council had independant conversation with the opposing party litigants.

At approximately 7:30 p.m. on that date, council of record informed the Court by and through it's law clerk, Victoria A. Negrelli, that an agreement had been reaached, and that the trial could therefore be vacated. This Court, upon receiving such information, directed council to memorialize their agreement in full resolution of any and all issues raised and submit the same to the Court within ten

(10)days. The Court then vacated the trial and allowed council and the party litigants to leave the premises.

The following morning the plaintiff/debtor, Patsy Penn, came to the U.S. Courthouse in Terre Haute, Indiana, and presented herself to the secretary, Judith A. Trainer. This she did on her own without informing her own council or any other party to the action. She informed Ms. Trainer that she and her husband did not agree with the proposed settlement. She further stated to Ms. Trainer that she and her husband wanted an opportunity to appear in Court to explain and present their position as to what had occurred over the past three (3) years past.

Mrs. Penn's council, Peter D. Miller, happened to be on the premises that day at a scheduled 341 meeting of creditors in another unrelated case. This Court, when informed by Ms. Trainer, directed that Mrs. Penn be put in contact with her attorney, and that her attorney communicate with her immediately. The Court then interrupted a regularly sched-

uled trial of another case and directed Mrs. Penn, together with her council of record, to appear in Court and make a statement on the record.

Mrs. Penn, having been duly sworn, took the stand and testified that a settlement agreement with the Bank (defendant herein), had been reached the night before which included a rewriting of their indebtedness to the Bank. She testified further that this was precisely what she and her husband were attempting to avoid. Mrs. Penn also testified that she did not fully realize the arrangement that had been made until the next day, and that she had been uncomfortable with the negotiations and their outcome throughout the night.

Debtor, Patsy Penn, further stated that the reason she and her husband went along with the settlement was because she was informed by the attorneys that this Court was "hostile" toward hearing their case because of the heavy docket, and that the judge wanted them to settle. She then alluded that this "hos-

tility" by the Judge against her case was demonstrated by the fact that the Judge had chastened one of her witnesses for reading a newspaper in Court.

The Court then assured the Debtor that he felt no hostility whatsoever against her case, was unaware of it's status, and whether negotiations were in progress and would have readily called the same on for trial that evening as soon as the adversary matters scheduled before it had reached their conclusion.

The Court did acknowledge that it had reprimanded an attorney who was one of the of the intended witnesses of the plaintiffs herein for reading a paper in open court to the extent that he was shuffling and turning pages in such a noisy and disruptive manner that it became difficult for the Court to hear the testimony that was being elicited in another case. The Court did not have any knowledge that this individual was connected with the Penns' cause of action.

The Court then asked the Debtor if she

thought she could get a fair trial before this Court, to which the Debtor responded, "Yes". The Court assured her that he would be indeed fair in all instances and without bias. Mrs. Penn acknowledged in open Court that she was satisfied that her perception that the Court had a hostility was not well founded, and that she was willing to have this Court hear the case, but that she did not wish to affirm what was represented to the Court to be a settlement.

As a result of these facts and circumstances, this Court believes that even though the debtor , Patsy Penn, believes that this Court can conduct a fair and impartial trial, her previous perception, the information given her regarding the Court's disposition for the case in which she was involved, all lead this Court to conclude that it would be wise to transfer this case to another judge for trial. A recusal by the undersigned would ensure the appearance of total impartiality and eliminate any possibility of complaint when the case is finially decided because of the events which

occurred on the 30th day of September, 1987.

The Court states without equivocation that it was not aware of any of the above events recited by Mrs. Penn, was not hostile, and in fact had no predisposition of any nature, type or discription as to any of the particulars and matters in the instant case. However, so as to eliminate even the mere appearance of any irregularities, this Court feels compelled to refer this case to another United States Bankruptcy Judge.

Without deciding the thrust and accuracy of that which the attorneys did or did not tell their clients, it is this Court's conclusion and determination that their action and events were not clearly communicated, and as a result, this confusion has occurred, including the need for referral.

This Court believes, however, that the debtors may feel that this Court has been tainted by this episode and that the debtors would probably feel more confortable and confident if the remainder of their Bankruptcy proceedings were heard before another Bank-

ruptcy Judge.

Wherefore, it is hereby ORDERED, ADJUDGED, AND DECREED that the undersigned, Michael H. Kearns, does now recuse himself from this Adversary Proceeding, as well as the main Bankruptcy proceeding entitled Robert E. and Patsy Penn, cause no. 85-02103-TH, and does now hereby direct all files pending in these Bankruptcy proceedings to be transferred to the Clerk, United States Bankruptcy Court in Indianapolis, Indiana, for the purpose of re-assigning this case to another Bankruptcy Judge.

IT IS SO ORDERED at Evansville, Indiana, this 15th day of December, 1987.

Michael H. Kearns, Judge
U.S. Bankruptcy Court

ADVERSARY PROCEEDING NO. 87-0481

Bankruptcy Case # IP87-7652RAJ

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Robert E. Penn, and Patsy S. Penn	)	
	)	Filed
Debtor/Plaintiffs	)	
	)	March 15, 1988
v	)	
	)	
The Parke State Bank	)	
	)	
Defendant	)	

Before: Frank J. Otte, Bankruptcy Judge

ORDER DENYING REQUEST FOR TRANSFER

The Debtors, now acting pro se, filed their Request for Transfer with the Motion of Appeal on March 14, 1988. The request for transfer seeks the return of this case to Terre Haute and Judge Kearns.

Because Judge Kearns recused himself from the Adversary Proceeding, neither this case nor the Adversary Proceeding can be transferred back to him. Therefore, the Request for Transfer is DENIED.

Dated 3/15/88

Frank J. Otte
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
FEDERAL BUILDING
EVANSVILLE, INDIANA

812-465-6463
JCS 332-6463

To: Honorable Robert Bayt, Chief Judge
United States Bankruptcy Court
Southern District of Indiana
U.S. Court House, 46 E. Ohio St.
Indianapolis, Indiana 46204

From: Michael H. Kearns, Bankruptcy Judge

Letter dated: April 1, 1988

In re: Robert and Patsy Penn
Bankruptcy Case # IP87-7652RAJ
Adversary Proceeding #87-0481

Dear Judge Bayt,

Enclosed please find a letter sent to this office attention Chief Administrative Judge.

I know not who the Chief Administrative Judge is, but send the same to you as you are the Chief Judge for the United States Bankruptcy Court of this District.

I had at an earlier stage in these proceedings recused myself, and this matter should not be before me because of that fact.

The litigant is acting in a pro se capacity and may be confused as to the proper pro-

cedures and parties to follow and contact.

A copy of this correspondence is being sent to Honorable Frank J. Otte as well as the pro se litigant, Patsy Penn.

Sincerely yours,

M.H.K.

Michael H. Kearns, Judge

No. IP87-7652RAJ

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS, INDIANA

Robert E. Penn, and	)	
	)	Filed
Patsy S. Penn	)	
	)	May 3, 1988
Debtors	)	
	)	

Before: Frank J. Otte, Bankruptcy Judge

ORDER GRANTING MOTION TO WITHDRAW PLAN AND DISCLOSURE STATEMENT, AND ORDER SETTING DEADLINE FOR FILING AMENDED PLAN AND DISCLOSURE STATEMENT

The Debtor's filed a Motion to Withdraw Pleadings on Plan of Reorganization and Disclosure Statement and Request for Time to Amend Pleadings as Necessary on May 2, 1988. The Court has reviewed those pleadings, and now ORDERS that the Motion to Withdraw is GRANTED, and the Debtor's Disclosure Statement and Plan are WITHDRAWN.

The Court further ORDERS that the Debtor shall have to and including July 1, 1988, to file an amended disclosure statement and amended plan. Failure to file such pleadings

by that date will result in dismissal or conversion to Chapter 7.

Dated May 3, 1988

Frank J. Otte

BANKRUPTCY JUDGE

No. IP88-299-C

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

Robert E. Penn, and Patsy S. Penn	)	
Debtor/Plaintiffs	)	Filed
v	)	June 7, 1988
The Parke State Bank	)	
Defendant	)	

Before: Sarah E. Barker, Judge

ORDER

The Court has before it plaintiff's "Emergency Motion for Stay Pending Appeal", filed June 2, 1988. Plaintiffs, though represented by council at earlier stages of this proceeding in bankruptcy, are now appearing pro se. The Court, therefore, applying liberal standards appropriate to pro se matters in terms of deciphering the legal intentions of the unrepresented party, finds that the Plaintiff's motion apparently is in request to stay the terms of a previously agreed upon adequate protection plan entered into by the parties and approved by th Court as a part of

this bankruptcy proceeding.

The specific basis of the appeal that brings this case to th district court is the Bankruptcy court's "Order on Objection to Claim" entered on March 4, 1988, following an adversary proceeding. That order established that the Parke State Bank ("Bank") held a secured claim in the amount of $70,845.93, less a set-off of $2,500.00, for a net secured claim of $68,345.93 against the debtor/plaintiffs. The agreement of Adequate Protection, entered pursuant to the parties'stipulation on February 21, 1986, obligated plaintiffs to the resumption of their monthly mortgage payments at the rate of $588.10 in lieu of the Bank's proceeding to foreclose. The agreement further provided that:

> 7. In the event of default in the terms of this preliminary agreement not cured within 30 days after notice thereof, the 11 USC s 362 Automatic Stay shall be lifted to allow Bank to pursue it's remedy with respect to said real estate in any court of competant jurisdiction.

Though Plaintiff's motion lacks clarity, they appear to complain that the Bankruptcy

Court Order, from which they are appealing to the district court, does not reflect payments which they had made under the requirements of the Agreement of Adequate Protection. Since these monies paid by them to the Bank pursuant to the agreement were "deemed irrevelant" by the Bankruptcy Court when it calculated the amount of the secured claim of the Bank, Plaintiffs' assert they "have paid no further payments nor intend any further payments toward the invalid claim of the Parke State Bank, pending appeal decision". (para. 6.a, Plaintiffs' Emergency Motion for Stay Pending Appeal").

The pending motion was apparently prompted (and became an emergency matter) by the April 27, 1988 letter from the attorney for the Bank notifying plaintiffs that the Bank intended to pursue remedies under the Agreement of Adequate Protection within thirty (30) days if the default in their regularly monthly payments to the Bank in the amount of $588.10 was not cured. (Exhibit attached to Emergency Motion of Stay).

The Court finds upon due consideration, that the plaintiff's motion for stay must be denied. The Obligation undertaken by the plaintiffs in the Agreement of Adequate Protection were, from all appearances, voluntarily assumed by them. The agreement binds the plaintiffs to a regular payment schedule of monthly mortgage payments from the date it was entered throughout the remainder of the bankruptcy proceedings and this appeal, and was reached as a compromise between the parties whereby the Bank received payments on the loan and waived it's right to proceed immediately to foreclose in exchange for the plaintiffs' agreement to pay the monthly payments and maintain possession of the mortgaged dwelling. It should be noted that the Plaintiffs' have not taken issue in their appeal with any claimed irregularity or illegality relating to the agreement itself. The Agreement (and the Order approving the same) is an entirely separate issue and at this point, the parties appear bound to it.

Since the parties apparently continue to

to reside in the residence on which the Bank holds this mortgage, a stay of the agreement, would substantially, perhaps irreparably, prejudice and impair the ability of the Bank to protect it's interests pending the completion of these proceedings. Conversely, the refusal to grant a stay will not jeapordise plaintiffs' ability to prosecute their appeal. In fact, if anything, a stay whereby plaintiffs would be relieved of their obligation to make their monthly mortgage payments while still living in the residence would unjustly enrich plaintiffs. They are not entitled to such a benefit simply on the basis of their having chosen to appeal another, basically unrelated, decision of the Bankruptcy Court.

The "Emergency Motion for Stay Pending Appeal" is therefore DENIED.

It is so ORDERED this 7th day of June, 1988.

Sarah Evans Barker
United States District Court
Southern District of Indiana

No. 85-C-13

PARKE CIRCUIT COURT
County of Parke
1988 Term

The Parke State Bank Plaintiff v Robert E. Penn, and Patsy S. Penn Defendants	Filed June 6, 1988

MOTION FOR SUMMARY JUDGEMENT

Comes now the Plaintiff by council and moves the Courtfor Summary Judgement pursuant to Indiana Trial Rule 56 on the grounds that the pleadings with exhibits together with testimony to be elicited at the hearing on this Motion for Summary Judgement will show that there no longer exists a genuine issue of material facts, by reason of which this Plaintiff is entitled to Summary Judgement in it's favor as a matter of law.

The Parke State Bank

by: James O. Hanner

Attorney for Plaintiff

NO. IP88-299C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS, INDIANA

Robert E. Penn, and Patsy S. Penn	)	
debtor/plaintiff	)	Filed
v	)	June 24, 1988
The Parke State Bank	)	
Defendant	)	

Before: Sarah Evans Barker Judge

ENTRY for June 24, 1988

The motion for stay of state court proceedings, filed with this court on June 21, 1988, is DENIED; most issue raised here was resolved by the Court's prior entry of June 7, 1988. The motion to continue a state court hearing is more appropriately advanced in that forum. There is no legal basis for the relief sought in this Court.

No. IP88-299C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Robert E. Penn, and Patsy S. Penn	)	
	)	Filed
Appellants	)	
	)	August 3, 1988
v	)	
	)	
The Parke State Bank	)	
	)	
Appellee	)	

Before: John Daniel Tinder, Judge

ENTRY for August 3, 1988

The plaintiff's August 2, 1988, emergency motion to stay state court trial is DENIED. This motion repeats claims which were denied in the June 24, 1988, ruling of a similiar motion.

No. IP87-7652RAJ

UNITED STATES BANKRUPTCY COURT
Southern District of Indiana
Indianapolis Division

In re:

Robert E. Penn, and)
) Filed
Patsy S. Penn)
) August 18, 1988
DEBTORS)

Before: Frank J. Otte, Bankruptcy Judge

ORDER DENYING REQUEST TO VACATE ADEQUATE PROTECTION AGREEMENT

This case came before the Court on August 18, 1988, on the debtor's Request to Vacate the Adequate Protection Plan of Agreement and Request to Stop State Court Proceeding. Patsy Penn appeared in person. Michael Hile and James O. Hanner appeared for the Parke State Bank.

By their request, the Debtors seek to have a Preliminary Agreement of Adequate Protection with the Parke State Bank vacated. That agreement was signed by council for the Debtors and by council for the Parke State Bank, filed with the Bankruptcy Court, and approved by the Bankruptcy Court on February

21, 1986. Specifically, the Debtors claim that they were unaware of the so called "drop dead" provision in the agreement, whereby Parke State Bank can proceed with their foreclosure action once the Debtors' cease making monthly payments.

The Court finds that Patsy Penn was present at the hearing for relief from stay filed by the Parke State Bank. At that hearing the agreement for adequate protection payments were read into the record. The Debtors did not object at the hearing, and did not appeal the order approving the agreement.

The Debtors made payments in accordance with the agreement for sixteen months. After losing their Adversary Proceeding against the Parke State Bank, the Debtors ceased making monthly payments and fired their attorney. Parke State Bank proceeded with it's foreclosure action.

The Debtors' seek to avoid the consequences of their agreement with the Parke State Bank by asserting that the adequate protection agreement is "fraudulent". The Court finds

no evidence of fraud.

The Debtors have failed to sustain their burden of proof. The integrity of the bankruptcy system would be seriously threatened if debtors were allowed to escape adequate protection agreements with as little evidence as presented here.

The Court finds no grounds to enjoin the state court foreclosure proceeding.

The request to vacate the adequate protection agreement is DENIED. Parke State Bank is free to proceed with it's foreclosure action.

Dated August 18, 1988

Frank J. Otte
BANKRUPTCY JUDGE

No. IP88-299C

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

Robert E. Penn, and Patsy S. Penn	)	
Appellants	)	Filed
v	)	September 1, 1988
The Parke State Bank	)	
Appellee	)	

Before: Sarah Evans Barker, Judge

ENTRY for September 1, 1988

This matter comes before the court on appellants' emergency final request for reconsideration of stay pending appeal of state court proceeding. Appellant again appears to seek from this Court an order staying the state court foreclosure action. This issue has been resolved by repeated rulings indicating this Court lacks jurisdiction to stay the state court action and that a motion filed in the state court case might allow appellants to obtain the relief they seek. No hearing is required and therefore the request for the same is DENIED. The request for stay is also DENIED.

No. 85-C-13

PARKE CIRCUIT COURT
State of Indiana
1988 Term

The Parke State Bank	)	
	)	
v	)	Filed
	)	
Robert E. Penn, and Patsy S. Penn	)	October 21, 1988

By: James O. Hanner, Attorney for

The Patke State Bank

(BANK'S) CONTENTIONS

The Parke State Bank is a banking organization operating under the laws of the state of Indiana with its principal place of business located in the Town of Rockville, Indiana. On the 29th day of December, 1976, the Defendants by their promissory note promised to pay the Parke State Bank the principal sum of $62,000.00 pursuant to the payment schedule as set forth in the origional note. At the same time and place, the Defendants executed a mortgage to the Parke State Bank securing said note and granting to the Bank a first mortgage upon residence real estate located in Parke County. From the date of the mort-

gage until the filing of their Chapter 11 Bankruptcy the Defendants were consistantly late seventy out of eighty seven times. The Bank alledges that there was no consistant pattern of payments made on behalf of the Defendants as shown by the record of payments.

The mortgage was further in a constant state of default by the failure of the Defendants to pay insurance and real estate taxes. On December 20, 1983 the Plaintiff (Bank) filed an action of foreclosure in the Parke Circuit Court under cause no. 83-C-288 seeking to foreclose upon the note and mortgage. This foreclosure was dismissed on or about March 9, 1984 as a result of the Defendant's bring the same current and paying attorney fees.

The action before this Court is a result of a subsequent foreclosure action filed January 10, 1985. Subsequently, Defendants filed their Chapter 11 petition in the bankruptcy court and the action for foreclosure was stayed pursuant to the order of the bankruptcy court. The Bank filed a petition for adequate protection and/or abandonment and an agreed

entry of adequate protection was entered on January 17, 1986. Pursuant to the agreement, the defendants were to move into the vacant residence, make arrangements to have the utilities turned on, pay past and current real estate taxes, secure insurance and make regular monthly payments to the Bank in the regular amount. Thereafter, the Penn's objected to the claim of the Parke State Bank and the same wasset for trial in the Terre Haute Division of the Bankruptcy Court. On the night of the hearing, prior to trial, the parties entered into an agreement and the same was reduced to writing and initialed by this council and then council for the Penns. The following day, Mrs. Penn informed Judge Kearns that she had been forced into a settlement. He then recused himself from the case and the same was assignedto Judge Frank Otte in the Indianapolis Division. A trial on the objections to the claim was held before Judge Otte and he allowed a set-off to the Penn's in the sum of $2,500.00 for violation of the U.C.C.C. and for attorney fees. Defendant's believing

this judgement being adverse, then represented that they would make no further payments under the adequate protection plan. Pursuant to the drop dead clause contained therein, this foreclosure action was reactivated and set for hearing. Penn's then filed a pleading in the Parke Circuit Court which prompted Judge Dowd to recuse himself.

The Penn's are still in the Chapter 11 reorganization bankruptcy and it is the contention of the plaintiff that the questions raised by the defendants are res judicata as to all matters of fraud, violations of the U.C.C.C., reallocations of previously settled payments, and all other matters propounded by the defendants. (See Trial Brief attached hereto.)

Further, the Defendant's have prayed this Court for a trial by jury. Not only is such a request grossly untimely, it is not allowed by statute.

Plaintiff's contentions are therefore basic, i.e. defendants executed a note and mortgage, the note and mortgage are in default

and judgement should be rendered on the note and foreclosed as to the real estate. Plaintiff is further entitled to reasonable attorney fees in this matter.

WITNESS AND EXHIBIT LIST

Plaintiff may call as witnesses in this matter the following:

1. James R. Bosley, Vice Pres. P.S.B.
2. Roger Allen, Assistant Cashier, PSB

EXHIBITS

Plaintiff may introduce as exhibits in this matter:

1. Copy of note and mortgage.
2. Any and all exhibits offered by the defendants.
3. Copies of Bank records showing payments for insurance & real estate taxes.
4. Copy of real estate appraisal;
5. Copies of correspondence between the parties.

James O. Hanner
Attorney for Plaintiff
Parke State Bank

No. IP88-299C

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indiaanapolis Division

Robert E. Penn, and Patsy S. Penn	)	
Debtor/Plaintiff	)	Filed
v	)	December 16, 1988
The Parke State Bank	)	
Defendant	)	

Before: Sarah Evans Barker, Judge

ENTRY (Nullifying Appeal)

The Court has before it the "Motion of Appeal" of Robert E. and Patsy S. Penn. This document appears to have been sent to the United States Court of Appeals for the Seventh Circuit and received by the Clerk of such Court on November 14, 1988. It was then transmitted to the Clerk of this Court for appropriate processing with the implication that such document is a notice of appeal. The Clerk of this Court then filed the document on November 14, 1988, the date of it's receipt in the Court of Appeals.

Mr. and Mrs. Penn reside in Rockville,

Indiana and are currently appealing in this Court the disposition of certain aspects of their bankruptcy in the United States Bankruptcy Court for this District. Commencing in June 1988 and thereafter the Penns have attempted to induce this Court to intervene ina foreclosure action pending against them in the Parke Circuit Court. This Court has recently denied those requests, most recently on September 1, 1988, when the Court Denied their "Emergency Final Request for Reconsideration of Stay Pending Appeal of State Court Proceedings". In denying such "final request" the Court stated that the issue which Mr. and Mrs. Penn sought to bring before it had been resolved "by repeated rulings indicating this Court lacks jurisdiction to stay the state court action and that a motion filed in the state court case might allow the appellants to obtain the relief they seek." It is unclear precisely what action or inaction of this Court Mr. and Mrs. Penn may now be seeking to appeal. It is clear that there has been no "final judgement" appealable under 28

U.S.C. s 1291 or any other appealable order. Nor has this Court made any final determination of the Penn's appeal from the Bankruptcy Court. It is also unclear that the notice of appeal, if the appellant's document can be treated as such, was filed more than thirty (30) days after this Court's last action in the above case. No request for an extension of time in which to file a notice of appeal has been submitted. A district court is not entitled to treat an untimely notice of appeal as an implied request for an extension of time in which to file a timely notice of appeal. Muhammad v DeRobertis, 788 F.2d 1268 (7th Cir. 1986). Mr. and Mrs. Penn have neither filed an application to proceed in appeal in forma pauperous nor paid the docketing fees for an appeal. Under all the above circumstances the Court finds that the "Motion for Appeal" received by the Court of Appeals on November 14, 1988 and then filed in this Court on the same date is a nullity and requires no action by this Court. However, if Mr. and Mrs. Penn desire to appeal any ruling of this Court they

should consult the procedures and time periods prescribed in Rule 4 and Rule 24 of the Federal Rules of Appellant Procedure.

It is so ORDERED this 16th day of December, 1988.

Sarah Evans Barker, Judge
U.S. District Court

No. IP87-7652RAJ

UNITED STATES BANKRUPTCY COURT
Southern District of Indiana
Indianapolis Division

Robert E. Penn, and	)	
	)	
Patsy S. Penn	)	Filed
	)	
DEBTORS	)	January 4, 1989

Before: Frank J. Otte, Bankruptcy Judge

ORDER GRANTING DEBTORS MOTION OF DISMISSAL

The debtors filed their Motion of Dismissal on December 7, 1988. The Court sent a notice dated December 12, 1988 to all creditors and parties in interest which informed them of the debtors motion for dismissal and gave them up to and including January 3, 1989 in which to object to the Debtors' motion. No objections were filed on or before the time specified. Accordingly, the Court now GRANTS the Debtors'Motion of Dismissal and FURTHER ORDERS that this chapter 11 proceeding is DISMISSED.

Dated January 4, 1989

Frank J. Otte

Bakruptcy Judge

B 13-9

Case No. 85-02103-TH RA

UNITED STATES BANKRUPTCY COURT

For the Southern District of Indiana

In re:

Robert E. Penn, and	)	
	)	
Patsy S. Penn	)	Filed
	)	
DEBTOR*	)	December 28, 1986
	)	
Chapter 11	)	

PROOF OF CLAIM: ACCEPTANCE OR REJECTION OF PLAN

1. (If claimant is a corporation claiming through an authorized officer) The undersigned who resides at RR#1, Marshall, In. 47859 is the Vice President of The Parke State Bank, a corporation organized under the laws of the State of Indiana, andis authorized to make this proof of claim (if appropriate, and to accept or reject the plan) on behalf of the corporation.

2. The debtor was, at the time of filing of the petition initiating this case, and still is indebted (or liable) to this claimant in the sum of$53,618.84 principal; $9,918.37 accrued but unpaid interest;

258.72 late fees and $3,550.00 attorney fees all as of 11-21-86. The total amount owed is $67,345.93.

3. The consideration for this debt (or grounds of this liability) is as follows: Real estate loan made 12-29-76 in the principal sum of $62,000.00.

4. This claim consists of $ 53,618.84 in principal amount and $ 13,727.09 additional charges (or no additional charges). (Itemize all charges in addition to the principal amount of debt, set basis for, inclusion and computation, and set forth any other consideration relevant to the legality of any charge.)

$9,918.37 accrued interest; 258.72 late fees; $3,550.00 attorney fees.

5. (If the claim is founded on a writing) The writing on which this claim is founded (or duplicate thereof) is attached hereto (or cannot be attached for the reason set forth in the statement attched hereto).

6. (If appropriate) This claim is founded on an open account which became (or will be-

come) due on...no response.

7. No judgement has been rendered on the claim except None.

8. The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

9. This claim is not subject to any setoff or counterclaim except debtor claim for setoff based upon alledged violation of federal truth in lending by creditor.

10. No security interest is held on this claim except security interest in single-family dwelling located at RR, Rockville, In., 47872. (If security interest in property of the debtor is claimed) The undersigned claims the security interest under the writing referred to in paragraph 5 hereof (or under a separate writing which (or duplicate of which) is attached hereto, or under a separate writing which cannot be attached hereto for reason set forth in the statement attached hereto). Evidence of perfection of such security interest is also attached hereto.

11. This claim is a general unsecured claim, except to the extent that the security interest, if any, described in paragraph 10 hereof is sufficient to satisfy the claim. (If priority is claimed, state the amount and basis thereof). $67,345.93 Total Amount Claimed.

12. For secured creditors: claimant accepts (or rejects) the debtors plan dated-rejection heretofore filed.

Name of Creditor: The Parke State Bank

Signed: James R. Bosley, Vice President

Dated: 11-25-86

PENALTY FOR PRESENTINF FRAUDULENT CLAIM. Fine of not more than $5,000 or imprisonment for not more than 5 years or both--Title 18, U.S.C., s 152.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND REGULATIONS INVOLVED IN THE CASE

1. United States Constitution, Article III, Section 2, clause 2:

"....In all other cases before mentioned, the Supreme court shall have appellate Jurisdiction, both both as to Law and Fact, with such Exceptions, and under such Regulations as Congress shall make".

2. United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it's jurisdiction equal protection of the laws".

3. Civil Rights Redress Act, 42 U.S.C. s 1983:

"Every person who, under color of any statute, ordinance, regulation custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person

within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action of law, suit in equity, or any other proper proceeding for redress". 17 Stat.13 (1971).

4. United States Constitution, Article III, Section 3.(1).

"Treason against the United States shall consist only in leving war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.".

5. Title 11 U.S.C. s 105: Power of the Court:

a) "The Bankruptcy Court may issue any order, process, or judgement necessary or appropriate to carry out the provisions of this title".

b) "Not withstanding subsection (a) of this section, a bankruptcy court may not appoint a receiver in a case under this title".

6. In re Penn Cent. Transp. Co., D.C. Pa. 1972, 346 F. Supp.1330:

"Equitable powers of bankruptcy court should be applied to end that fraud will not prevail, that substance will not give way to form and that technical considerations will not prevent substantial justice from being done".

7. Bankruptcy Rule s 1330:

a) "On request of a party in interest at any time within 180 days after the date of entry of an order of confirmation under section 1325 of this title, and after notice and a hearing, the Court may revoke such order if such order was procured by fraud."

b) "If the Court revokes an order of confirmation under sub-section (a) of this section, the court shall dispose of the case under section 1307 of this title, unless, within the time fixed by the Court, the debtor proposes and the Court confirms a modification of the plan under section 1329 of this title."

8. Bankruptcy Rule 8005:

"A motion for stay of judgement, order, or decree for other relief must ordinarily be made in the first instance in the bankruptcy court. The district court or the bankruptcy appellate panel may suspend an order pending the appeal. A motion for such relief, or modification of termination of relief granted by the bankruptcy court, may be made to the district court or bankruptcy appellate panel, but the motion shall show why the relief, modification, or termination was not obtained from the bankruptcy court".

9. Bankruptcy Rule 8001(c):

"After the appeal has been docketed, it may be dismissed by the appellate Court, on agreement or on motion of the appellant, or on such terms and conditions as the appellate court may impose".

10. F.R.A.P. X. Cross Appeals and Joint Appeals:

"The appellee may, without having to file a cross-appeal, defend a judgement on any ground consistant with the record, even if rejected in the lower Court and should not file a cross-appeal in this instance. But a party can not attack the judgement, either to enlarge his own rights thereunder or to lessen the rights of his adversary, unless he files a cross-appeal. A cross-appeal is necessary when alternation of a judgement is sought, even if the appellee seeks merely to correct an errior in the judgement or to suppliment the judgement with respect to a matter not dealt with below. Jordan v Duff & Phelps, 7815 F.2d 429 (7th Cir.1987). Thus, the Court of Appeals is often called upon to decide more than one appeal from a single district court judgement".

11. Title 18 U.S.C. s 152: Penalty for Presenting Fraudulent Claim:

...."Fine of not more than $5,000.00 or imprisonment for not more than 5 years or both".

12. U.C.C.C. 24-2-2-3 Offense

Sec.3. "A person who knowingly violates this chapter commits a Class C felony. (As amended by Acts 1978, P.L.2 sec.2401).

HISTORICAL NOTE

Acts 1978, P.L.2, sec.2401, emerg.

eff. July 1, 1978, rewrote this section which prior thereto read: "Any violation of the provisions of this act shall be deemed and is hereby declared to be destructive of full and free competition and a conspiracy agaiinst trade, and any person or persons who may engage in such a conspiracy, or who shall as principal, manager, director, or agent, knowingly carry out any of the stipulations, purposes, prices, rates, or orders made in furtherance of such conspiracy, shall on conviction be punished by a fine of not less than one hundred dollars ($100), or more than five thousand dollars ($5000), and by imprisonment in the penitentiary not less than one (1) year, or more than ten (10) years, or by the judgement of the Court, by either said fine or imprisonment." (Formerly Acts 1897 c. 104, s 3).

13. U.C.C.C. 24-1-1-1 Contracts Against Public Policy: Null and Void Contracts

"From and after the passage of this act, all arrangements, contracts, trusts, or combinations between persons or corporations who control the output of said (any) article of merchandise, made with a view to lessen, or which tend to lessen, full and free competition in the importation of sale of articles imported into this state, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations who control the output of said article of merchandise, designed or which tend to advance, reduce, or control the price or the cost to the producer or to the consumer of any such product or article, are hereby declared illegal and void."

14. U.C.C.C. 24-1-1-2 Violation of Act: Domestic Corporations, Forfeiture of Charter and Franchise: Foreign Corporations, Prohibition:

Sec. 2. "Any corporation, chartered under the laws of this state, which shall violate any provisions of this act, shall thereby forfeit it's charter and franchise, and it's corporate existance shall thereupon cease and determine. Every foreign corporation which shall violate any provisions of this act, is hereby denied the right to do so, and is prohibited from doing business in this state. It is hereby made the duty of the Attorney General of the state to enforce this provision by due process of law."

15. U.C.C.C. 24-4.5-2-414 Limitation on Default Charges:

Sec. 414. "Except for reasonable expenses incurred in realizing on a security interest, the agreement with respect to a consumer*credit sale may not provide for charges by the*buyer other than those authorized by this article."

(for closely identical provision see UCCC 24-4.5-3-405 i.e.* loan; *debtor)

16. U.C.C.C. 24-4.5-2-204 Deferral Charges:

Sec. 204. "With respect to a precomputed credit sale, refinancing, or consolidation, the parties before or after default, may agree in writing to a deferral of all or part of

one or more installments, and and the seller may make and collect a charge not exceeding the rate previously stated to the buyer pursuant to the disclosure (part 3) applied to the amount or amounts deferred for the for the period of deferral calculated without regard to the differences in lengths and months, but proportionately for a part of a month, counting each day as one-thirtieth (1/30) of a month. A deferral charge may be collected at the time it is assessed or at any time thereafter.

2) The seller, in addition to the deferral charge, may make appropriate additional chrges (24-4.5-2-202), and the amount of these charges which is not paid in cash may be added to the amount deferred for the purpose of calculating a deferral charge.

3) The parties may agree in writing at the time of a precomputed credit sale, refinancing, or consolidation that if an installment is not paid within ten (10) daysafter it's due date, the seller may unilaterally grant a deferral and make charges as provided in this section. **No deferral charges may be made for a period after the date the seller elects to accelerate the maturity of the agreement.**

4) A deliquency charge made by the seller on an installment may not be retained if a deferral charge is made pursuant to this section with respect to the period of deliquency. (Formerly Acts 1971, P.L. 366,s.3.)

17. U.C.C.C. 24-4.5-2-203 Deliquency Charges

Sec.203. "With respect to a precomputed credit sale, refinancing or consolidation, the parties may contract for a deliquency charge on any installment not paid in full within ten (10) days after it's scheduled due date in an amount not exceeding the greater of:

a) an amount not exceeding five dollars ($5), which is five percent (5%) of the unpaid amount of the installment, or

b) the deferral charge (sub-section (1) of 24-4.5-2-204) that would be permitted to defer the unpaid amount of the installment for the period that it is deliquent.

2) A deliquency charge under para. (a) of sub-section (1) may be collected only once on an installment however long it remains in default. No deliquency charge may be collected if the installment has been deferred and a deferral charge (24-4.5-2-204) has been paid or incurred. A deliquency charge may be collected at the time it accrues or at any time thereafter.

3) No deliquency charge may be collected on an installment which is paid in full within ten (10) days after it's scheduled installment due date even though an earlier maturing installment may not have been paid in full. For the purpose of this section, payments are applied first to current installments and then to deliquent installments.

4) The amount of five dollars ($5) in

sub-section (1) is subject to change pursuant to the provisions of adjustment of dollar amounts (24-4.5-1-106)." (Formerly: Acts 1971, P.L. 366,s.3.)

18. U.C.C.C. 26-1-1-205 Course of Dealing and Usage of Trade

Sec. 205. 1) "A course of dealing is a sequence of previous conduct between parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existance and scope od such a usage are to be proven as facts. If it is established that such a usage is embodied in a written trade code or similiar writing the interpretation of the writing is for the court.

3) A course of dealing between parties and any usage of trade in which they are engaged or of which they are or should be aware give particular meaning to and suppliment or qualify terms of an agreement.

4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed whenever reasonable as consistant with each other; but when such construction is unreasonable, express terms control both course of

dealing and usage of trade and course of dealing controls usage of trade.

5) An applicable usage of trade in the place where any part of preformance is to occur shall be used in interpreting the agreement as to that part of the preformance.

6) Evidence of a relevant usage of trade by one party is not admissable unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter."

19. U.C.C.C. 26-1-1-203 Obligation of Good Faith

Sec. 203. "Every contract or duty within this Act imposes an obligation oof good faith in it's preformance or enforcement.

20. U.C.C.C. 24-4.5-1-101:

Sec. 101 short title- "This article shall be known and may be cited as the Uniform Consumer Credit Code." (Formerly Acts 1971, Public Law 366 s 2.)

21. Indiana Rule of Law for Mortgage

Acceleration Clauses:

"Where the acceleration of the maturity of a mortgage debt on default is made optional with the mortgagee, some affirmative action must be taken by him evidencing his election to take advantage of the acceleration provision***until such action has been taken the provision has no operation. The exercise of this option should be made in a man-

ner clear and unequivocal, so as to leave do doubt as to the mortgagee's intention." 55 Am. Jr. (2d Mortgages, Section 386)

22) U.C.C.C. 24-4.5-2-415 Authorization to Confess Judgement Prohibited

Sec. 415: "A*buyer or lessee may not authorize any person to confess judgement on a claim arising out of a*consumer credit sale or consumer lease. An authorizatioin in violation of this section is void."

(For closely identical provision see UCCC 24-4.5-3-407: i.e.*debtor, *consumer loan).

23) U.C.C.C. 26-1-1-107 Waiver or Renounciation of Claim or Right After Breach

Sec. 107: "Any claim or right arising out of an alledged breach can can be discharged in whole or in part without consideration by a written waiver or renounciation signed and delivered by the agrieved party."

24) U.C.C.C. 26-2-4-1 Agreements to Pay Attorney Fees Prescribed

Sec. 1. "Any and all agreements to pay attorney fees, depending upon any condition therein set forth, and made a part of any bill of exchange, acceptance, draft, promissory note, or any other written evidence of indebtedness are hereby declared illegal and void. Provided that nothing in this section shall

be construed as applying to contracts made previous to the taking effect of this act."

25) U.C.C.C. 24-1-2-1 Illegal Combinations

Exceptions, Offense, Defense

Sec. 1. "Every scheme, contract, or combination in restraint of trade or commerce, or to create or carry out restrictions in trade or commerce, or to deny oor to refuse to any parson participation, on equal terms with others, in any telegraphic service transmmitting matter prepared or intended for public use, or to limit or reduce production, or increase or reduce the price of merchandise, or any commodity, or to prevent competition in manufacturing, within or without this state, is illegal but this chapter may not be construed to apply to or repeal, modify, or limit, or make unlawful, any of the powers, rights, or privileges now existing or conferred by law upon any person. A person who makes such a contract, engages in such a combination or scheme, entered into without this state, commits a Class A misdemeaanor. However, it is a defense to any action growing out of any violation of law relating to the subject matter of this chapter for the defendant to prove that the violation is not in restraint of trade or commerce, or does not restrict trade or commerce, limit or reduce the production, or increase or reduce the price of merchandise or commodity, or prevent competition in manufacturing". (As amended by Acts, 1978, P.L.2, s2402.)

26) 12CFR 226 Promulgated Under 11 USC s1601 et seq.

12 CFR 226.9(6) "Whenever a customer has a right to rescend a transaction under paragraph (a) of this section, the creditor shall give notice of the fact to the customer***Before furnishing copies of the notice to the customer, the creditor shall complete both copies with***the date of consummation of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the customer may give notice of cancellation."

12 CFR 226.8(b) (3) The creditor... "shall provide disclosure of the sum of payments required by the terms of the note, using the term "total of payments."

12 CFR 226.8(d) (3) specifically requires "disclosure of the total amount of finance charge".

27) IC 24-4.5-3-301 (2) provides: "The lender shall disclose to the debtor to whom credit is extended with respect to a consumer loan the information required by either this part, or the Federal Consumer Credit Protection Act."

28) U.C.C.C. 34-1-53-7 When Foreclosure Unavailable

"The plaintiff shall not proceed to foreclose his mortgage while he is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he is seeking to obtain execution of any judgement in such other action;

nor shall he prosecute any other action for the same matter, while he is foreclosing his mortgage, or prosecuting a judgement of foreclosure." (Formerly, Acts 1881, Ch.38 s 718.)

29. U.C.C.C. 26-2-3-14 **Judgement and execution**

Sec. 14. "Upon any instrument in instrument in writing, made within this state or elsewhere, containing a promise to pay money without relief from valuation laws, judgement shall be rendered and execution had accordingly."

HISTORICAL NOTE

FOR THE REPEAL OF THE PROVISIONS OF THIS SECTION which are in conflict with the Uniform Commercial Code, see the italized note preceding the first of this chapter. (Formerly Acts 1861, c.75,s15).

30. U.C.C.C. 26-1-10-102 **SPECIFIC REPEALER**

Sec.102. "The following Acts and parts of Acts are hereby **repealed: Effective Date July 1, 1964. (revelant chapter) Chapter 75 of the Acts of 1861 and Chapter 80 of the Acts of 1875 governing the rights of parties on certain regotiable and non-negotiable instruments.**

31. United States Constitution, Article II

Section 4. "The President, Vice-President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."